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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 487

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. O'DONNELL, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 967) is reported in 91 F. (2d) 14.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 22, 1936 (R. 1034). On November 19, 1936, petitioner filed a petition for rehearing, which was denied on June 7, 1937 (R. 1035). On August 19, 1937, an order was granted, extending the time for filing a petition for certiorari to and including October 7,

1937 (R. 1035). The petition for a writ of certiorari was filed on October 7, 1937, and was granted on November 8, 1937 (R. 103). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Board of Land Commissioners for California and, upon review, the District Court for that State had before them in the 1850's a Mexican private land claim to Mare Island in San Francisco Bay, now a Federal naval reservation. If the Mexican claim failed, some swamp and overflow lands, a portion of which are here in controversy, would not be part of the public domain but instead, according to the view taken by the court below, would have passed to California under the general terms of the Swamp Act. The United States, while resisting the Mexican claim before the Board of Land Commissioners, purchased the whole property from the claimants in order to insure its use for naval purposes, but continued to resist the entire claim as it felt it was bound to do under the terms of the statute providing for the adjudication of native titles and in order to defeat the precedent which would be established by the validation of the Mexican grant, and for other reasons. But, because of the swamp land feature and the purchase of the property by the United States, the court below now takes a posi-

tion in favor of the successors of California, on the ground that the United States consciously and fraudulently engaged in a collusive suit, failed to resist the Mexican claim properly, and allowed decrees to go for the claimants, thus defeating the grant to California and securing for itself the swamp lands in question. Since 1853 the United States has occupied these lands and used them for military and naval purposes under claim of right and absolute ownership in fee. Accordingly, the three ultimate questions presented are—

(1) Whether, irrespective of all other contentions, the United States has acquired good title to the lands in dispute by adverse possession;

(2) Whether, apart from adverse possession, the decrees of the Board and District Court confirming the title to these lands as a part of Mare Island in the predecessors of the United States are conclusive upon respondents herein;

(3) Whether, apart from the decrees, the lands here in question as a part of Mare Island never passed to California and its successors under the Swamp Act—in view of the rule that tracts wholly claimed under alleged Mexican grants in California, irrespective of the subsequent action of the Board or courts in confirming or rejecting the claims, were entirely reserved from the operation of the Swamp Act.

Subordinate contentions under the second question are separately stated in the summary of the argument and in the argument proper.

STATUTES INVOLVED

The full text of the Act of September 28, 1850 (c. 84, 9 Stat. 519) granting to the states all swamp and overflowed lands of the United States (hereinafter called the "Swamp Act"); the Act of March 3, 1851 (c. 41, 9 Stat. 631) creating a board of land commissioners and providing for the determination of private land claims in the State of California (hereinafter called the "Mexican Claims Act"); and Chapter XLIII, Laws of California, 1854–1855, pp. 48–49, consenting to the purchase of Mare Island by the United States, are set forth in the Appendix, *infra*, pp. 95–106.

STATEMENT

The United States brought this suit in the District Court for the Northern District of California to quiet title to a tract of land on Mare Island, Solano County, California, which it has occupied since 1853 as a part of the Mare Island Navy Yard Reservation (R. 2–3). The court was asked to cancel a purported patent which had been issued by the United States to California (in compliance with a writ of mandamus from the Court of Appeals of the District of Columbia, R. 37–39, that court stating that "the mere issuance of a patent to California determines no legal or equitable right of the United States in the premises") and another issued by California to one Darlington in 1857 (R. 17), through whom the respondents herein claimed some interest in the land (R. 13). The historical

background, essential to an understanding of the case, may be concisely summarized as follows:

American military commanders in California, during the war with Mexico, officially proclaimed that Mexican land titles would receive due recognition from the United States,[1] thus foreshadowing the formal guarantees in the peace treaty and protocol of 1848.[2] Coincident, however, with this undertaking on the part of the United States, there was a firm resolve to defend the public domain in the new territory against invalid or fradulent claims, an attitude frankly stated during the treaty negotiations[3] and, indeed, very strongly held by influential groups in the Congress.[4]

After the treaty of peace and the admission of California into the Union as a state, the Mexican Claims Act of March 3, 1851, combining these elements of magnanimity and caution, carried out the treaty pledge by permitting all persons claiming

[1] Proclamation to the Inhabitants of California, July 7, 1846, at Monterey, by Commodore John D. Sloat, 29th Cong., 2d Sess., House Doc. No. 4, pp. 644–645; similar proclamation, August 17, 1846, at Ciudad de Los Angeles, August 17, 1846, by Commodore and Governor R. F. Stockton, *id.*, pp. 669–670.

[2] The treaty is in 9 Stat. 922–943; see esp. Articles VIII and IX. The protocol is in 61st Cong., 2d Sess., Sen. Doc. No. 357, pp. 1119–1120.

[3] On the attitude of this Government, see 30th Cong., 1st Sess., Sen. Ex. Doc. No. 52, pp. 83, 291–293.

[4] Congressional Globe, 31st Cong., 2d Sess., pp. 116–117, 157–160, 347–352, 403–408, 426–430, 438–439.

under Mexican or Spanish grants in California to seek confirmation of their claims before a commission composed of three members, and provided an "agent" to "superintend the interests of the United States."[5] Claimants or the Government could petition for review in the district courts and in the Supreme Court. Later, by the twelfth section of the Act of August 31, 1852, 10 Stat. 76 at 99, the Attorney General was put in charge of appeals from decisions of the Board adverse to the interests of the United States.

The Commission began its work in January, 1852, with a reminder by the General Land Office that "the great object of the Government, * * * is to ascertain, settle, and recognize all bona fide valid titles derived from the former sovereignties of the country and to detect, and forever put to rest, all fabricated, fraudulent or simulated grants."[6] The 813 claims totaled 19,148 square miles of land,[7] much of it of incalculable value and in densely populated areas. The Commission confirmed more than 500 claims, on "broad principles of equity."[8]

The present case arises out of the early adjudication of one of these Mexican claims. As found by

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[5] 9 Stat. 631, Sec. 4; see also provision for "associate law-agent," 10 Stat. 76, Sec. 12 at page 99.

[6] 32d Cong., 1st Sess., Sen. Ex. Doc. No. 26, pp. 2–6, at 2.

[7] The figure on the extent of the land involved is compiled from the materials in the Appendix in Ogden Hoffman, Reports of Land Cases, 1862.

[8] On the Commission's operations and adherence to "broad principles," see Joseph Ellison, California and the Nation, 1927, p. 15.

the trial court, the Mexican Governor of California on May 20, 1841, granted the entire island to Victor Castro. Bissell and Aspinwall, having succeeded to Castro's title under the grant, filed their petition before the Board of Land Commissioners seeking confirmation of their claim of title as provided in the Mexican Claims Act (R. 5, 164). Thereafter, proceedings were had, and on May 8, 1855, the Board entered a decree confirming claimants' title (R. 5–6, 164–165). The United States appealed from the Board to the District Court of the United States for the District of California, where the decree of the Board was affirmed and the claimants' title again confirmed (R. 7, 166, 167). Because of "accident, oversight, inadvertence or excusable neglect" (R. 21, 290), the decree of the court had not been signed or entered, and a decree nunc pro tunc as of March 2, 1857, was signed, filed and entered on April 15, 1930 (R. 20–22, 289–291).

On December 18, 1852, while these proceedings were still pending before the Board, Bissell and Aspinwall executed a contract to sell Mare Island to the United States (R. 308–312) and on January 4, 1853, joined in a deed conveying title to the Government for a consideration of $83,491.00 (R. 22–26, 168–169, 302–308). On February 28, 1853 they executed a bond in favor of the United States in the sum of $200,000.00 conditioned upon the validity of their contract and the conveyance of "the entire and absolute fee simple Estate in the said tract of land known as Mare Island" (R. 309), it being re-

cited in the bond that they "shall at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns or others represented by the said Wm. H. Aspinwall" (R. 310). The bond further recited that they should "also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or body politic which may within two years from the date hereof be made and thereafter be successfully established" (R. 311).

Also, while these proceedings were still pending, on May 11, 1854, California consented to the purchase by the United States of the whole island, and in addition granted all its title and interest to and ceded its jurisdiction over certain other swamp lands on the shores of Mare Island. California Statutes, 1854–1855, C. XLIII, pp. 48–49.

Theretofore, on November 6, 1850, President Fillmore had reserved the island from public entry (R. 8, 328–329) and on February 9, 1853, the Secretary of the Navy had selected Mare Island for a Navy Yard and a Naval Depot, recommending that the "premises be reserved from public use." His selection had been approved and the lands reserved for naval purposes by the President on February 11, 1853 (R. 9, 381).

The United States has at all times since September 16, 1853, been in "actual, open, adverse, and exclusive" possession of the land "under claim of right and of absolute ownership in fee of said land, and under the title and color and claim of title," and has placed improvements upon the property here involved which exceed $1,250,000 in value (R. 10–11, 171–172).

However, on March 18, 1857, on the application of one Darlington who evidently assumed that under the Swamp Act the lands in question had passed to the state, California issued a patent to the tract (R. 30–33, 388; Plaintiff's Exhibit I–1, original). The patent was not recorded, however, until twenty-two years thereafter, June 6, 1879 (R. 33), when one Sawyer, formerly a clerk in the Navy Yard (R. 637) and then Chief Correspondence Clerk in the office of the Surveyor General of California (R. 634), appears to have acquired the Darlington claim. See *Sawyer* v. *Osterhaus,* 212 Fed. 765, 767. Respondents claim that, through conveyances from these parties, legal title is vested in them (R. 109–110).

The lands here in controversy include only a very small fraction of the island, embracing originally only 164 acres of swamp or overflowed lands on its shores (R. 163). Partly through accretion and partly by "filling in" operations, in the course of more than seventy years this fraction has grown to about 500 acres (R. 1010). Beginning in 1897, the

United States erected levees, dykes, and "fills" (R. 764, 784–785, 789, 796–797, 806, 811, 816, 855, 904) so that the tract is now about three feet above the mean high water line or "almost up to the yard grade" (R. 820).

By their amended answer (R. 100–121) respondents denied the Government's ownership of the lands here in controversy, and asserted title in themselves as tenants in common (R. 100). By specific denials they put in issue the existence and validity of the Castro grant (R. 101, 109), the validity of both decrees of confirmation (R. 101–102), the validity of the conveyance to the United States and of the Executive Reservation Orders (R. 102), and the prescriptive title of the United States (R. 104). The amended answer prayed "that the title of these defendants be quieted as against plaintiff (R. 121); and to support their prayer for such affirmative relief the respondents alleged that the lands in question were swamp lands which passed to California under the Act of September 28, 1850. Respondents' principal contention was, however, that the lands in question were not a part of Mare Island and not within the terms of the Castro grant (R. 101–103, 109, 117–119), and the greater part of the transcript of record herein is devoted to evidence given at the trial with reference to that contention.

The trial court made findings of fact and conclusions of law in favor of the United States and

against the defendants on all of the issues (R. 160–201) and gave a decree granting the relief prayed for by the United States (R. 202–206).

On appeal, the Circuit Court of Appeals for the Ninth Circuit reversed the decree, holding "that the United States has no title to the patented lands in suit and that the title is in and quieted in appellants" (R. 1034). Upon denial of the Government's petition for rehearing, the court amended its original opinion but reaffirmed its holding (R. 967–1009). Circuit Judge Haney dissented (R. 1009–1034, 1035).

In its opinion the majority held that the decrees of the Board of Land Commissioners and of the District Court on appeal in the case of *Bissell and Aspinwall* v. *United States*, in which the Castro title was confirmed in the claimants, are null and void because the United States had purchased the interests of the claimants while the proceedings were pending; that consequently these decrees have no value as proof of the validity of the title purchased by the United States from the claimants; and that therefore the entire record of the *Bissell and Aspinwall* case should have been stricken from the evidence in the instant case (R. 990–1004). They rejected petitioner's contention that the pendency of the Castro claim withdrew these lands from the operation of the Swamp Act and that therefore California acquired no title to the lands (R. 1004–1009). They held that the reservations made by

President Fillmore for military and naval purposes were ineffective because California had previously acquired an inchoate title under the Swamp Act, and they assumed to re-examine the original Mexican claim but on various grounds rejected as inadmissible all evidence offered as to its existence or validity. The court entirely ignored the findings of the trial court (R. 171–172, 179, 197–198) to the effect that the United States had acquired title to the lands in question by adverse possession.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the United States fraudulently colluded with Bissell and Aspinwall to deprive California of the lands in question.

2. In holding that, with reference to these lands, the United States was a trustee and California was its cestui que trust and that in the proceedings in *Bissell and Aspinwall* v. *United States* before the Board of Land Commissioners and the District Court it had a trust duty to perform which it deliberately violated in purchasing the property of the claimants in the pending proceedings and improperly defending the interests of its cestui, and that therefore California was not bound by the decrees.

3. In holding that California was a "third person" under Section 15 of the Act of March 3, 1851

(9 Stat. 631, ch. 41) and that, therefore, California and respondents are not bound by the decrees in *Bissell and Aspinwall* v. *United States.*

4. In holding that the proceedings in *Bissell and Aspinwall* v. *United States* were non-adversary and hence subject to collateral attack by California or respondents.

5. In holding that the United States, in seeking to have declared void the patent issued by the Secretary of the Interior to California, was subject to "more than ordinary burden of proof" applicable to suits to quiet title.

6. In holding that the lands in question were subject to the operation of the Swamp Act of September 28, 1850, despite the pendency of the Castro claim.

7. In holding that on September 28, 1850, by the Swamp Act, the United States transferred to California "the entire equitable interest in the lands" and even "whatever title it had to the swamp and overflowed lands here in question."

8. In holding that the signature of the district judge was necessary to the validity of the decree in *Bissell and Aspinwall* v. *United States,* and in holding that the decree was not effective as of March 2, 1857, or May 8, 1855.

9. In failing to hold that the respondents were barred from upsetting the decree in *Bissell and Aspinwall* v. *United States,* because of California's

acquiescence in the proceedings and because of the doctrine of laches.

10. In holding that the United States can take no benefit from the decree in *Bissell and Aspinwall* v. *United States,* and that the motion to strike from the evidence the judgment and record in that case should have been granted.

11. In holding that the decrees rendered in *Bissell and Aspinwall* v. *United States,* under the Act of March 3, 1851, c. 41, 9 Stat. 631, were not conclusive as against attack by California or respondents.

12. In failing to hold that the United States had acquired title by adverse possession.

13. In failing to affirm the decree of the District Court, in not quieting title in the United States, and in quieting title in respondents.

SUMMARY OF ARGUMENT

I

The United States has acquired title by adverse possession. The court below disregarded petitioner's claim of ownership by adverse possession, despite pleadings, proof, and specific findings to that effect by the trial court. It is well settled that adverse possession is an adequate basis for a suit in equity by the United States to quiet title. Since 1850 the lands have been reserved by presidential order and openly and notoriously used, occupied and improved for military and naval purposes

under claim and color of right and absolute ownership in fee. Under California law prescriptive title ripens in five years.

Respondents' defenses to the possession of the United States are wholly without merit. They at all times have had judicial remedy which they failed to invoke to secure for themselves any rights they might have had in the lands. Their protests to governmental officers in possession came too late and, in any event, were insufficient. Their claim that the United States held the lands as a trustee for California or respondents as the successors of California under the Swamp Act does not alter the situation, because both the federal and California courts hold that a trustee may acquire prescriptive title to land held in trust after open and unequivocal repudiation of the trust and actual knowledge thereof by the cestui, as is the case here.

II

The decrees of the Board of Land Commissioners in 1855 and, on appeal, of the District Court in 1857, rendered pursuant to the Mexican Claims Act and confirming the Mexican grant to Castro (of whom the United States is the successor by purchase), are valid, binding, and conclusive upon respondents as successors of California under the Swamp Act.

(1) Under the settled course of decision of this Court, California, as an alleged grantee of the lands

from the United States under the Swamp Act, is not a "third person" under the provision of the Mexican Claims Act regarding the effect of decrees rendered thereunder; and, therefore, respondents, as successors of California, are not the "third persons" who, under the terms of the Act, are free to attack the decrees rendered.

(2) The decree of the District Court, on appeal from the Board, is valid as of the date the court ordered its entry, 1857, despite the fact that it was neither signed nor "entered" until signed and entered nunc pro tunc as of 1857 on motion of the United States in 1930.

(3) The United States (contrary to the position of the court below throughout its opinion) was required to shoulder no "heavy" or "extraordinary" burden of proof to maintain its right to a decree quieting title in the lands. In any event, whatever burden could be put upon the United States under any rule of law has been amply satisfied by the evidence of record.

(4) The court below erred in holding that the United States had defrauded California by engaging in an asserted collusive suit before the Board and District Court in the proceedings under the Mexican Claims Act. There were no pleadings or proof of collusion between the United States and claimants under the Mexican grant and the question was neither raised nor submitted to the District Court herein nor to the court below. In any

event, the record shows that the United States conducted the proceedings in good faith, having a true adverse interest and fully disclosing its transaction with Bissell and Aspinwall. California by legislation assisted in and assented to the transaction.

(5) The court below erred in holding the United States to be a trustee for California under the Swamp Act, but in any event, even assuming a trust relationship, respondents, as the successors of California, are estopped by consent and acquiescence and barred by laches by reason of their long delay in seeking relief.

(6) The proceedings were in fact adversary in character since a genuine controversy remained despite the transaction between the United States and Bissell and Aspinwall. In any event, adversary proceedings were not required before the Board as an administrative tribunal. So far as the proceedings on appeal before the District Court were concerned, that court did not necessarily lose jurisdiction in view of the nature of the transaction, the stage of the proceedings at which it occurred, and the consequent discretion of the court in disposing of the matter. In any event, even assuming that the appeal failed for want of adversaries, the decree of the Board would still stand; and, under the settled course of decision, respondents are estopped to attack the jurisdiction of that court now, since they stood by for more than half a century and allowed the United States to reclaim

the land and make improvements of great value thereon.

(7) The validity of the Castro grant cannot now be reexamined as an original matter in view of the settled course of decisions of this Court.

III

Wholly aside from the questions of adverse possession or conclusiveness of the decrees, the Swamp Act did not grant to California any title to the lands here in question because that Act applied, under the applicable decisions of this Court, only to lands which, at the time it was passed, were of the public domain. California lands as to which there were Mexican claims outstanding, such as the Castro claim, were not parts of the public domain but were reserved and excepted from disposal under general grants by the United States. Hence, respondents' asserted source of title, the Swamp Act, passed no interest to California, from whom respondents derive their alleged title. Respondents are therefore wholly without any valid claim or title to the property.

ARGUMENT

I

THE UNITED STATES HAS ACQUIRED TITLE BY ADVERSE POSSESSION

The Circuit Court of Appeals completely disregarded petitioner's claim of ownership by adverse possession. Irrespective of any infirmities the

court below may have believed to inhere in the other sources of the Government's title, the record submitted to the court below indisputably proved that the United States is the absolute owner of the lands in question by reason of long, adverse, and exclusive possession of them.

It is well settled that adverse possession is an adequate basis for a suit in equity by the United States to quiet title. *United States* v. *Oregon,* 295 U. S. 1, 25; *Stanley* v. *Schwalby,* 147 U. S. 508, 517. Cf. *Sharron* v. *Tucker,* 144 U. S. 533; *Alexander* v. *Pendleton,* 8 Cranch. (12 U. S.) 461; *McCormack* v. *Silsby,* 82 Cal. 72, 76; *Baker* v. *Clarke,* 128 Cal. 181, 187; *President and Presiding Elder, Etc.,* v. *Goodwin,* 119 Cal. App. 37; *Park* v. *Powers,* 2 Cal. (2nd) 590.

The bill of complaint alleged that the United States has occupied the area here in dispute as a part of the Mare Island Navy Yard Reservation for military and naval purposes since the year 1853 (R. 3–4), its possession having "been actual, open, adverse, and exclusive and under claim of right and of absolute ownership in fee" (R. 10–11). Respondents disputed generally the ownership of the lands by the United States (R. 61, 75, 87, 100). But they did not deny the Government's possession, contending instead that "any possession of the premises * * * was secured by military force and trespass." Then, by way of affirmative defense, they pleaded that defendants "did everything they legally could to resist the intrusions and

trespasses of the plaintiff" (R. 65, 79–80, 91–92). See also Paragraph XXVII of Amended Answer (R. 115–116).

a. *Findings of trial court.*—With issue thus joined, the Government introduced evidence proving its alleged adverse possession (R. 328–329, 379–383, 466–467, 540, 546, 580, 583–590, 764, 767, 774, 784–786, 797, 806, 808). Respondents objected to none of this testimony, offered none to dispute it, and made no attempt to support their affirmative defense of protest.

The trial court thereupon found (R. 171–172) that:

> The possession of the United States of America has at all times been actual, open, adverse, and exclusive and under claim of right and absolute ownership in fee of said land, and under the title and color and claim of title * * * The lands * * * during such period of occupancy * * *, have been improved for military and naval purposes by the construction of buildings and improvements thereon. Said buildings and improvements are now actively and continuously used by the complainant for naval and military purposes and have been so used since the construction and making thereof and there is now located on the northerly portion of said land * * * a Marine Corps Rifle Range, a Submarine Repair Base, an Aviation Landing Field, a causeway to the Navy Yard, an overseas freight

shipment transit shed, Navy Yard scrap bins and storage, an electrified classification yard for railroad, storage corrals, moorings for destroyers, and many other buildings, structures and utilities, all of which were and are of a value exceeding $1,250,000 and were and are used by the complainant for the operation and activities of its naval and military force.

With reference to the affirmative defense pleaded by respondents, the court found (R. 197–198):

> It is not true that the possession taken by plaintiff of the premises embraced in Swamp and Overflow Survey No. 34 was secured by trespass or without right or color of title, and it is not true that until March 9, 1928, any of the defendants were without legal capacity to maintain any legal action or equitable proceedings to recover possession of said premises, or to quiet the title of them, or any of them, in or to said premises, or that defendants had no legal or equitable remedy to repel any alleged trespass or entry of plaintiff, or its officers, agents or attorneys. It is not true that defendants, or any of them, did everything they could to resist any entries, intrusions or alleged trespass of the plaintiff or its agents, prior to its acquiring said federal patent to the State of California.

See also Finding No. XXI (R. 179).

In their appeal, respondents assigned these findings as error (R. 912, 918, 923, 927) and argued

them in their brief to the Circuit Court of Appeals. Hence there is no basis for any assertion by respondents that "this is a new question raised by petitioner not considered by the court below" (Br. in Opp., p. 2). On the contrary, since the question was fully before it, the Court of Appeals was obliged to accept the findings of the trial court unless it appeared that they were clearly erroneous. *Borden's Co.* v. *Ten Eyck,* 297 U. S. 251, 261; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 455; *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 329; *United States ex rel., Charley* v. *McGowan,* 62 F. (2d) 955, 957 (C. C. A. 9), affirmed, 290 U. S. 592; *W. H. Markell & Co.* v. *Mutual Ben. Life Ins. Co.,* 63 F. (2d) 193 (C. C. A. 9); *Collins* v. *Finley,* 65 F. (2d) 625, 626 (C. C. A. 9).

In not even considering the findings, as respondents admit was not done (Br. in Opp., pp. 2, 12), the court below prejudicially erred. Possibly the explanation for this course of the court below was the failure of Government counsel actively to urge this ground in support of the decision of the trial court. But the findings on adverse possession were put in issue by the appellants below themselves; the Government neither in brief nor argument conceded the point, and accordingly there was no justification whatever for the reversal of the trial court without considering this ground of its decision.

b. *The evidence.*—Respondents now ask this Court to "consider the evidence as in a trial *de novo*" (Br. in Opp. pp. 12–13). As has just been indicated, an appellate court will not disturb the findings of the equity trial court unless they are manifestly erroneous. But, even if the evidence should be reexamined here, there can be no doubt of the correctness of the trial court's findings.

It appears from the record that in 1850 President Fillmore, by Executive Order, reserved Mare Island for "public purposes" (R. 328–329) and again, in 1853, at the request of the Secretary of the Navy, for use as a "Navy Yard and Depot" (R. 379–383). Two years later, Captain Farragut, then in command of the new navy yard, constructed an artillery target "across the Tuly on the Northern end of the Island" (R. 774) and a road along the beach (R. 786). At the same time, a "borrow pit," from which sand has ever since been taken for building purposes, was started (R. 766–767). In 1858, a steam engineering building was erected, partly on the lands here involved, at a cost of $370,000, and that building still stands (Plaintiff's Exhibit G. G. original; R. 764, 766, 785, 786).

In 1873, when the question of the area of Mare Island first seems to have arisen, Admiral Rogers, then Commandant of the Yard, wrote to the Navy Department that the ownership of the tule lands was necessary in order for the Government to control the water front and prevent damage to the

harbor and to "hinder the establishment of objectionable manufacturies, or habitations for junkmen or liquor dealers" (R. 782). The matter was laid before the Solicitor of the Navy Department and on October 20, 1873 he advised that the United States had good title "to the whole of Mare Island, upland and marsh" and vigorously added:

> If any private claimant is in possession of any part of the island, he should be evicted. If the United States have not taken full possession of the Island, they should do so without delay (R. 540, 546).

Admiral Rogers then promptly advised the Register of the California State Land Office that "this land is claimed and occupied by the United States," and protested against the issuance of any patents by the State or "against any action antagonistic to the ownership and possession by the Navy Department of the United States" (R. 838–839). A similar letter was dispatched to the Board of Supervisors of Solano County, protesting against the consideration of a petition of "certain persons," then pending before the Board, "to adopt measures to reclaim Tule land appertaining to Mare Island" (R. 800–801). The protest seems to have been effective, for the record does not show that any attempt was made to reclaim the land except by the Government.

In 1877, United States Surveyor Freeman reported that "Several Iron Monuments are erected near the water's edge along the Northern boundary

with notices thereon forbidding persons to trespass on the lands, as they are claimed by the United States Government" (R. 580).

Improvements continued to be made, petitioner's evidence showing that up to the year 1931 sixty-one separate improvements have been made on the lands here in controversy, at a cost of almost $2,000,000 (Plaintiff's Exhibit G. G. original). Respondents' statement that all of the improvements made before 1914 were "temporary improvements" (Br. in Opp., p. 13) and that "permanent expenditures were not made until 1918" (p. 14), does not accurately reflect the record. Plaintiff's Exhibit G. G. Original, lists more than $800,000 worth of improvements made before that time, which, for the most part, are still in active and continuous use. Furthermore, it is plainly not necessary for improvements to be permanent in nature in order to acquire title by adverse possession. The California statute says, "usually improved." Section 325, California Code of Civil Procedure.[9] See also, *United States* v. *Oregon*, 295 U. S. 1.

[9] This section contains a proviso that the party must have paid all state, county, and municipal taxes levied and assessed upon the land, but it is immaterial here that no taxes have been paid since none were assessed (R. 477, *Spargur* v. *Heard*, 90 Cal. 221, 230; *Heilbron* v. *Water Ditch Co.*, 75 Cal. 117), and since in any event the United States is not subject to property taxation by the States (*Van Brocklin* v. *Tennessee*, 117 U. S. 151, 180; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219, 223).

The foregoing acts of ownership show that the United States acquired a valid prescriptive title under the laws of California by satisfying the requirements for such a title not only once but many times over, since in that state a "perfect title" is acquired by adverse occupancy for five years. Section 1007, Civil Code [10] and Sections 318–319, 320–325, 338, 343, Code of Civil Procedure; [11] *Akley* v.

[10] This suit is not affected by the recent amendment of Section 1007 of the Civil Code by Cal. Stat. 1935, p. 1592. The amendment is prospective in its language, precludes the acquisition of a prescriptive title only against a county, city, etc., does not apply to private owners or patentees, and its effect is limited to "possession by any person, firm or corporation."

[11] Section 318, provides:

> No action for the recovery of real property or for the recovery of possession thereof, can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question, within five years before the commencement of the action.

This provision was adopted on March 11, 1872, and was based on a statute of 1863 (Stats. 1863, p. 325), which appears to have been based on a statute of 1850 [2 Cal. Gen. Laws (Hittell, 1850–64) 4350], prescribing a five-year limitation period in somewhat different language.

Section 338, pertaining to actions other than for the recovery of real property, prescribes a limitation period of three years, *inter alia*, for actions for trespass upon or injury to real property and for actions for "relief on the ground of fraud or mistake." Section 343, pertaining to actions other than for the recovery of real property, prescribes, *inter alia*, a limitation period of four years for actions not otherwise provided for. Both of these sections were enacted on March

Bassett, 189 Cal. 625, 645; *Wutchumna Water Co.* v. *Ragle*, 148 Cal. 759, 764. This title extends not only to the lands physically occupied, but to the entire tract described in a "written conveyance" (such as the Bissell and Aspinwall deed), or "court decree" (such as the decrees given in the confirmation proceedings) upon which the claim or color of title is based (Section 322, Code of Civil Procedure).

c. *Respondents' remedy.*—Respondents may not defeat the force of this source of the Government's title by claiming that they had no available remedy by which to assert their rights until they secured a patent to the land in 1928, and that, by protesting to the Government officers, they exhausted every other method of preventing the ripening of prescriptive title in the United States.

In the first place, respondents may take no comfort from the dictum in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, which suggests that "protest against the occupancy and application for redress in the proper quarter" might be sufficient to toll the statute if there were no judicial remedy. Here respondents at all times had at least the judicial remedy which they finally invoked in 1925. They had simply to obtain a writ of mandamus against

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11, 1872, and were based on a statute of 1850 (Stats. 1850, p. 346).

While a ten-year period applies to claims against the State or its grantees, upon issuance of the State patent (1857 in this case), the five-year period becomes applicable. *Wilhoit* v. *Tubbs*, 83 Cal. 279.

the appropriate official and thus secure a patent to the lands; thereafter they had full capacity to bring an action in ejectment. *Work* v. *United States*, 23 F. (2d) 136, (App. D. C.), is complete proof of the feasibility of the procedure at all times available to respondents.

In the second place, even if mere protest to Government officers were sufficient to bar title by adverse possession, the record shows that none the less a title by prescription has long ago vested in the United States. The United States took possession of the land in 1853 and has occupied it ever since (R. 171, 381, 769). It was not until 1879, twenty-six years later, that respondents' predecessors made any protest whatever (R. 583, 589).[12]

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[12] Respondents may take no comfort from this tardy protest as an effective objection to the adverse possession of the lands here involved by the United States. Reference to the terms of the protest (R. 584, 594) shows that it was limited to an objection to the approval of the Freeman survey of the Island made in 1877 under the direction of the Surveyor-General of the United States for California pursuant to the Act of July 1, 1864 (Ch. 194, 13 Stat. 332, 334) entitled "An act to expedite the settlement of titles to lands in the state of California" and which provided for the determination of the boundaries of all finally confirmed private land claims. Even for this purpose, the communication was ineffective since it failed to comply with the terms of the Act because (1) it was not made within ninety days from the first publication of the notice of the completion of the Freeman survey (R. 570–571), but almost two years after the ninety-day period had expired; (2) it did not state distinctly the interest of the objector or identify who the objecting parties were; (3) it was not accompanied with affidavits or other proofs as required by Section 1 of the statute.

No further protest is shown to have been made [13] until thirty-one years later, in 1910, when judicial proceedings were finally commenced. See *Work* v. *United States, supra*, p. 137. As pointed out above, under California law a prescriptive title ripens in five years, so that clearly these two sporadic protests were wholly ineffectual to preserve respondents' rights, if any, to the property here involved.

d. *Alleged trusteeship.*—Nor may respondents avoid the application of the doctrine of adverse possession by any suggestion that at one time the United States held the lands as trustee for California under the Swamp Act. The courts, both of the United States and of California, hold that a trustee can acquire prescriptive title to land held in trust, after open and unequivocal repudiation of the trust and actual knowledge thereof by the cestui que trust. *Speidel* v. *Henrici,* 120 U. S. 377; *Dugan* v. *O'Donnell,* 68 Fed. 983 (C. C. N. D. Calif.); *Norton* v. *Bassett,* 154 Cal. 411; see *Zeller's Lessee* v.

[13] The hearsay statement in the report of the Board of Civil Engineers to the Secretary of the Navy in 1873, that "certain parties actually claimed to own a portion of this tule" (R. 488) has no probative value in showing that respondents' predecessors were the "certain parties" referred to or that they protested against the occupancy of the tract here involved by the Government. The similar statement in Admiral Rogers' letter in the same year that "we have been admonished not to take sand" (R. 783) is likewise defective insofar as it may be relied upon to prove that respondents' predecessors made protest "in the proper quarter."

Eckert, 4 How. 288, 295; *Willison* v. *Watkins,* 3 Pet. 43, 47–48; *Love* v. *Watkins,* 40 Cal. 547, 568–572; see pages 60 to 65, *infra.* Here the record clearly shows that the United States unequivocally repudiated California's claim, by claiming and using the land for its own purposes at all times since 1853, and that California and its grantees had knowledge of this repudiation. Moreover, California was officially advised of the Government's claim of ownership at least as early as 1873, six years before the Darlington patent was recorded (R. 800–801, 838–839, 33).

Accordingly, it is submitted that the court below erred in refusing to affirm the decree quieting the title acquired by the United States through adverse possession and in directing that title be quieted in respondents.

II

THE DECREES OF THE BOARD OF LAND COMMISSIONERS AND OF THE DISTRICT COURT ARE CONCLUSIVE UPON RESPONDENTS

It is the position of the Government that the decrees rendered by the Board in 1855 and on appeal by the District Court in 1857 under the Mexican Claims Act in the case of *Bissell and Aspinwall* v. *United States,* confirming the Mexican private land grant to Castro (which was purchased by the United States from Bissell and Aspinwall, who were Castro's successors), are conclusive and

binding upon respondents who, as the successors of California, are claiming part of the lands under the Swamp Act.

(1) *The Court below erred in holding that California was a "third person" under the Act and that therefore respondents, as successors of California, were not concluded by the decrees of confirmation.*

It is the position of the Government that the statutory provision of the Mexican Claims Act that decrees of the Board, or of courts, on appeal from the Board, shall be "conclusive" between the United States and the claimants under Mexican grants applies to respondents as the successors of California. Under the steady course of decisions of this Court, California, as a grantee of the United States, is not a "third person" under the statutory exception (that such decrees "shall not affect the interests of third persons"). The assumed bad faith of the Government cannot serve to justify a novel interpretation of the statute.

To prove that the United States had acquired a valid title to the lands by purchase from Bissell and Aspinwall in 1857, petitioner, with respondents' consent (R. 216), gave in evidence the decrees of the Board of Land Commissioners and of the District Court, affirming the Board on appeal, in which it was adjudicated that the Government's grantors were the owners in fee of the property here in-

volved (R. 279, 285, 289). Each of these decrees was rendered pursuant to the Mexican Claims Act, "An Act to ascertain and settle the private Land Claims in the State of California." Petitioner thereupon contended that the United States was entitled to rely upon its deed, in view of the terms of Section 15 of the Mexican Claims Act of 1851, which provides:

> That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

The decided cases hold that California, as a grantee from the United States, was not a "third person" under this section. *Knight* v. *U. S. Land Association,* 142 U. S. 161; *San Francisco* v. *LeRoy,* 138 U. S. 656; *More* v. *Steinbach,* 127 U. S. 70; *Beard* v. *Federy,* 3 Wall. (70 U. S.) 478; *Los Angeles Farm & Milling Co.* v. *Thompson,* 117 Cal. 594; affirmed, 180 U. S. 72; *People* v. *San Francisco,* 75 Cal. 388, 400; *Ward* v. *Mulford,* 32 Cal. 365, 370.

In each of these cases it was held that those claiming under a title derived from the United States, as respondents do, are bound by the confirmation decrees rendered pursuant to the Mexican Claims Act. For example, in *Ward* v. *Mulford, supra,* the plaintiff, who claimed title under a con-

firmed grant from Governor Alvarado, as petitioner does here, brought ejectment against the defendant who, like respondents, claimed title under California to swamp lands in that state. The court held that the defendant could not question the plaintiff's title because California and those claiming under it were bound by the results reached in the confirmation proceedings, saying (371–372):

> The State of California came into the Union with her claim to the lands within her borders, such as she took by virtue of her admission under general grants to all states previously made by the Federal Government * * * subordinate to the prior equities of grantees under the former sovereign, and bound by such action as the Federal Government might take in ascertaining and settling such equities.

See to the same effect, *Knight* v. *U. S. Land Association*, 142 U. S. 161, 184.

On rehearing before the court below in the present case, respondents conceded the correctness of petitioner's contention, saying (R. 1026):

> Nor is it our contention that, in the ordinary sense, the State of California and its successors in interest are "third parties" within the meaning of Section 15 of the Land Commission Act. Were that question still open, we think it could be demonstrated that the State of California and these appellants were intended by Congress to be re-

> garded as "third persons" whose interests should not be affected by proceedings in confirmation. * * * But we concede that it has been decided otherwise by the Supreme Court in regard to this particular statute * * *.

But despite respondents' concessions and the unequivocal judicial pronouncements, the majority below held that because of exceptional circumstances, which they felt were presented in the instant case, it became necessary to depart from the settled rule and to hold that respondents, as grantees of California, are "third persons" within the meaning of Section 15, *supra*, and are not bound by the confirmation proceedings in the *Bissell and Aspinwall* case.

The court below assigned as its reasons, for departing from the adjudicated cases, that: (1) the decrees were fraudulently obtained with the "connivance" of the United States; (2) the Government "consciously violated" its duty as a trustee for California by purchasing the interests of the claimants while the proceedings were still pending; or (3) the decrees were rendered in non-adversary proceedings. It will be fully shown in later sections of this brief that there is not the slightest basis for any one of these assumptions, but even if they were well-founded, yet the presence of any or all of these factors would not justify the new interpretation given the fifteenth section of the Mexican Claims Act by the court below. For ques-

tions of the jurisdiction and validity of the proceedings of the Board and of the courts on appeal from the Board are quite different from questions as to the interpretation of Section 15. That section applies to certain fixed classes of persons and governs their rights and relations as to claims confirmed by the Board, or by the courts on appeal. Section 15 ought not be subjected to a novel interpretation by which the term "third person" may vary from circumstance to circumstance for the alleged reason that the Board rendered a void decision because of fraud, collusion, or violation of duty by the party litigants, or for lack of adversary parties, if such were necessary. *Lord* v. *Veazie,* 8 How. 251, on which the majority below relies, lends no support to the court's new interpretation of Section 15 of the Act, for it merely involved the propriety of declining to consider a collusive suit and had nothing to do with the interpretation of a statute regulating the effect of decrees.

It is submitted that the court below erred in its interpretation of Section 15.

(2) *The court below erred in holding that the decree of the District Court was of no legal effect as of 1857 on the ground that though it had been ordered by the court, it had not been signed and entered.*

It is the position of the Government that, although the decree ordered by the District Court in 1857 was neither signed nor entered (until April

15, 1930, when, on the ex parte motion of the United States, it was so signed and entered nunc pro tunc), it was nevertheless a valid and subsisting decree as of the time it was ordered in 1857.

However, the court below seems to have taken the view that the decree rendered by the District Court in 1857 was invalid because it was not at that time signed by the judge or entered on the court docket, and that therefore, petitioner must rely upon the decree as if rendered as of April 15, 1930. From this assumption the court proceeded to hold that this decree did not affect either the equitable or legal rights of respondents (R. 996) because they were not made parties to the action at the time the nunc pro tunc decree was obtained in 1930, no notice was given them, and it was "secretly obtained" (R. 971). Upon these holdings the court below bottomed many of its crucial rulings (R. 971, 976, 978, 979, 990–992, 1004) which will be discussed *infra*, but it is pertinent here to point out that the court clearly erred in failing to give effect to the decree rendered in 1857, signed and entered, nunc pro tunc, in 1930.

Under settled rules of law, the signature of the judge was not essential to the validity of the decree given in 1857, since his signature "is merely to give the clerk a surer means of correctly entering that which has been adjudged." *In re Cook*, 77 Cal. 220, 227; *Crim* v. *Kessing*, 89 Cal. 478, 489. Even where signature is required by statute (which is not the case here), the statute is not mandatory but

directory only. *Secombe* v. *Steele*, 20 How. (61 U. S.) 94, 102; *United States* v. *Stoller*, 180 Fed. 910, 912–913.

Similarly, the mere failure of the clerk to perform the ministerial act of entering the decree in 1857 in no way impairs its validity. The minute entries of the court show that an order directing the entry of the decree was made on March 2, 1857 (R. 290) and the unsigned decree is dated the same day (R. 285). Such entries were amply sufficient on which to base a decree, *Freeman on Judgments*, 5th Ed., Sec. 127; *Black on Judgments*, 2nd Ed., Sec. 135, for when a decree has been ordered or directed and "through inadvertence of either court or counsel omitted from entry" a decree nunc pro tunc is entirely proper. *Cuebas* v. *Cuebas*, 223 U. S. 376, 390; *Cf. Mitchell* v. *Overman*, 103 U. S. 62, 64–65. And it is customary for such decrees to be rendered ex parte. *Ware* v. *Kent*, 123 Ala. 427; *International Harvester Co.* v. *Carlson*, 217 Fed. 736, 738; *In re Wright, Petitioner*, 134 U. S. 136.

Even though the judge neglected to sign the decree which on March 2, 1857, he had directed to be entered in the *Bissell and Aspinwall* case, it is apparent that the proceedings in 1857 had finally terminated the litigation. If there were any doubt, it is removed by the fact that the United States Attorney on April 1, 1857, applied for and was granted an appeal to the Supreme Court of the United States (R. 287). The order was vacated on notice by the Attorney General that the appeal would not

be prosecuted (R. 286), but it is perfectly evident that the trial court would not have allowed an appeal if there had been any thought that the matter was still *sub judice.*[14]

It is therefore submitted that the decree rendered in the *Bissell and Aspinwall* case was valid from the date upon which it was given and ordered to be entered, March 2, 1857, and that, as the dis-

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[14] *Bouldin* v. *Phelps*, 30 Fed. 547 (C. C., N. D., Cal.), decided in 1887, was an ejectment brought, by another claimant under the Castro Grant, against the Commandant of the Mare Island Navy Yard. The United States was then permitted to submit—as against the new claimant—evidence acquired as to the fraudulent nature of Castro's claim. The new claimant relied upon the decrees in the *Bissell and Aspinwall* case, but the court used language (p. 578) to the effect that, in the *Bissell and Aspinwall* case, "there was a neglect to follow up the order for a decree by the entry of a final decree. * * * The confirmation had not reached the stage yet, where it has become *res adjudicata*, and can operate as an estoppel. There is as yet, no final decree. * * * The matters are, therefore, still *sub judice.*" This language, as the court admitted (p. 564), was wholly unnecessary to the decision, since the real question in issue was whether the new claimant under Castro was required to have successfully presented his claim to the Board under the Mexican Claims Act before he could maintain ejectment as against one who was the successor of a successful claimant before the Board. Moreover, the language was used to avoid the effect of a case decided thirty years before. It obviously cannot control the plain legal effect of an order directing the entry of a decree, and the fact that an appeal was allowed in 1857 excludes any possibility that the parties and the judge understood that the mere omission of a routine step would operate to keep the case alive for disposition by a future generation.

senting judge below aptly observed, the decree nunc pro tunc in 1930 "did nothing more than was already done" (R. 1017). *In re Wight, Petitioner,* 134 U. S. 136; *Monarch* v. *Brey,* 106 Ky. 688; *Fox* v. *Hale & Norcross Co.,* 108 Cal. 478; *United States* v. *Chicago & Alton R. Co.,* 250 Fed. 101; *International Harvester Co.* v. *Carlson,* 217 Fed. 736.

(3) *The court below erred in requiring that the United States assume an extraordinary burden of proof.*

It is the position of the Government that the United States was not required to prove its title by more than the ordinary burden of proof merely because one of the clouds sought to be removed from its title was a purported patent from the United States.

An erroneous premise which pervades the entire opinion of the court below is its view that in this action the Government was charged with a "heavy" or "extraordinary" burden of proof to maintain its right to a decree quieting title (R. 968, 973, 990, 996). The court took the position that the patent issued by the Secretary of the Interior pursuant to the writ of peremptory mandamus in *Work* v. *United States,* 23 F. (2d) 136 (App. D. C.) was a "solemn evidence of title" which can be avoided only upon the production of "that class of evidence which commands respect, and that amount of it which produces conviction" (R. 973).

Work v. *United States supra,* was an action brought by the same parties who are respondents herein, to compel the issuance of a patent to the State of California for the lands in controversy, upon the theory that those lands passed to California in 1850 under the Swamp Act. The Court of Appeals for the District of Columbia granted the writ with the following explanation (p. 138), which is exactly contrary to the view of the court below in the present case:

> The mere issuance of patent to California determines no legal or equitable right of the United States in the premises.

In so holding the District of Columbia court was clearly right, for it has long been settled that if lands, as in the case at bar, "never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them," a purported patent attempting to convey them "would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed," and may be impeached in any action. *Smelting Co.* v. *Kemp,* 104 U. S. 636, 641, 646. Such a patent "is a simple nullity." *United States* v. *Conway,* 175 U. S. 60, 68.

Surely there can be no reason for imposing a severe rule of proof upon one who would dispel whatever cloud may arise from such a nullity. Certainly the cases cited by the court below do not sanction any such requirement, for they all, unlike

the present case, involve instances wherein it was sought to attack the validity of a voidable patent covering lands subject to disposition and issued by mistake or upon fraudulent proofs. *Maxwell Land Grant Case,* 121 U. S. 325; *United States* v. *Stinson* 197 U. S. 200; *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397. In such cases it is obvious why the courts are reluctant to disturb the "deliberate action of the tribunals to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee." *Maxwell Land Grant Case, supra,* 379. But such reasons do not exist in the instant case, for the "deliberate action" of the Secretary of the Interior in determining the validity of the California-O'Donnell claim, was to refuse to issue the patent until coerced by the order of the court in *Work* v. *United States, supra.* And this order, it should be noted again, was issued upon the assumption that it determined "no legal or equitable right."

Furthermore, this Court has never required the party attacking a patent to show by more than a preponderance of the evidence that the lands were not a part of the patentable domain. Cf. *United States* v. *Stone,* 2 Wall. 525; *United States* v. *Schurz,* 102 U. S. 378, 404; *Knight* v. *U. S. Land Association,* 142 U. S. 161, 176, and cases cited. There is no valid reason for requiring more here, and the court below clearly erred in holding peti-

tioner to more than the usual burden of proof imposed upon a complainant in the ordinary suit to quiet title to lands, i. e., proof of the essential averments of the bill of complaint. *United States* v. *Oregon,* 295 U. S. 1.

This error on the part of the court below is important since it lies at the root of further holdings. Thus the court ruled that, in view of this "heavy burden," the United States had not convincingly proved the validity of the Castro Grant (R. 977); that the Government can take no "advantage" of the nunc pro tunc decree of 1930 (R. 990); and that "it is the Government which must lift appellants from their stance on the trustee-cestui relationship" (R. 996). All of these holdings will be fully analyzed later on their merits. It will then appear that whatever burden could be put upon the United States under any rule of law has been amply satisfied by the evidence of record.

(4) *The United States did not defraud California.*

The majority of the court below held that respondents may defeat the right of the United States to rest upon the conclusiveness of the decrees rendered in *Bissell and Aspinwall* v. *United States* "by showing that such a contention cannot be maintained with clean hands" (R. 971). Despite the fact that respondents had not attempted

to make such a showing, the court proceeded to find that the decrees of confirmation were open to attack because the United States had "connived" in procuring them by continuing to defend the case after purchasing the claimants' interests (R. 998). That there may be no mistake as to the grounds for its holding, the court below specifically stated (R. 996–997):

> Much of the comment on the conduct of the government [15] would not be warranted did it not insist that, by section 15 of the Act of 1851, creating the Land Commission, the record and decree in the Castro proceeding there are "conclusive" against California and its successors.

a. Total absence of pleadings or proof of collusion.—It is the position of the Government that—in the complete absence of allegations, proof, find-

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[15] The whole tenor of the court's opinion is colored with such phrases as "pretended controversy—sham proceeding (R. 969)—non-adversary action (R. 971)—ethical considerations (R. 974)—prosecuting its unified non-adversary claimant-defendant appeal—faked opponent (R. 976)—ethics involved—purposeful shift of position (R. 978)—pretended adversary proceeding (R. 990)—simulated opposition—reprehensible—pretended adversaries (R. 991)—judicial farce—pretended attorneys—concealed non-adversary proceeding (R. 994)—ethical significance (R. 995, 1004)—pretendedly opposed claim—connived at and procured a decree—supposed adversary government (R. 998)—one-party non-adversary action (R. 999)—violation of professional ethics involved (R. 1002)," and so forth.

ings, or specifications of error with respect to any fraudulent collusion on the part of the United States or its agents in resisting the Mexican land claim—the Circuit Court of Appeals herein erred in assuming, without giving the United States notice or an opportunity to bring out the true state of facts, that the Government fraudulently colluded with the claimants.

Although the question had not been raised or considered either in the trial court or when the matter was argued and submitted to the Circuit Court of Appeals, the majority of the court below injected as an issue and found that the United States was guilty of fraud in the *Bissell and Aspinwall* case—a finding of fact with no evidence to support it. By thus resolving factual questions against petitioner which had never been at issue in this case, the court below failed to observe the ordinary rules of fair procedure. Moreover, though the decree of the Land Commission and the confirmatory decree of the court were attacked as null and void in respondents' answer (R. 101, 102), and, on various grounds, by their motion to dismiss (R. 142–145), nowhere did their pleadings or proofs suggest any fraud, collusion, bad faith, or concealment on the part of the Government. Not one of the sixty-nine assignments of error presented such a contention (R. 909–938). At so late a stage of the proceedings, the United States was wholly pre-

vented from marshalling evidence to rebut the court's assumption.

Such a holding takes the United States by surprise, denies petitioner its day in court, condemns the Government without a hearing, and constitutes prejudicial and reversible error. In *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, the petitioners, on certiorari, complained as petitioner does here, that the Circuit Court of Appeals had disposed of their case "on questions not raised by either party, and not considered when this cause was submitted" and contrary to the "attitude of the trial court" (p. 265). In reversing the judgment of the Circuit Court of Appeals, this Court condemned such procedure in no uncertain terms (p. 267):

> * * * we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard.

No reason appears in justification of this action of the court below, and it is submitted that its decision, on this ground, constitutes reversible and fundamental error.

However, even upon the record herewith submitted, as will be shown next, the court below was

unwarranted in assuming that the United States, through the Attorney General and the Secretary of the Navy and their subordinates, were guilty of fraudulently "conniving" to deprive California of the lands in question.

b. Bona fide nature of the proceedings.—It is the position of the Government that the mere precautionary purchase by the United States of land involved in a Mexican land claim, which the Government was resisting and continued to resist before the Board of Land Commissioners, constituted no fraud upon California. The United States did, and had every reason to, continue a bona fide resistance to the Mexican claim. The terms of its purchase provided that, should the Mexican claim be defeated, the United States could recover the purchase price. Attorney General Cushing was "constrained, in the plainest dictates of public duty", to prosecute the case vigorously through the Federal courts since, as a precedent, the case would affect "many millions worth of land in California, which is otherwise public domain." By act of its legislature, California evidenced its willingness to grant similar swamp lands to the United States without charge in order to secure the creation of a naval base. The District Court and the State of California were fully advised of the Government's transaction.

The assumption that the United States purposely sought to deprive California of its rights by not

honestly combating the claim of Bissell and Aspinwall is absurd on its face because the Castro grant involved the whole of Mare Island, and, as will be shown, if the Mexican claim were dismissed, the United States would thereby secure for itself the whole island, including the swamp and overflow lands (Point III, *infra*), without cost. The only part of the island to which California had even a potential claim was that which was swamp and overflowed, far less valuable than the upland portion of the island; and even under the view taken by the court below, if the Castro grant were defeated, at least the valuable uplands would revert to the United States and not to California. Moreover, the claimants had given bond for "the complete establishment and security of the title in the United States" (R. 311), and if the Mexican grant were defeated, the Government, at any time thereafter, could have recovered the purchase price of $83,000 and whatever damages, to the extent of $200,000, it might have suffered from the invalid conveyance from Bissell and Aspinwall. Finally, there is small doubt that California, to secure the local establishment of a Federal naval station, would gladly have ceded to the United States these remaining swamp lands of small value, as it did other lands of Mare Island for these same purposes (California Statutes, 1854–55, ch. 43, p. 48).

The opinion of Attorney General Cushing, which the majority of the court below relies upon as evi-

dence of bad faith (R. 992) shows, first, that the Attorney General felt "constrained, in deference to the plainest dictates of public duty," to protect the interests of the United States by an appeal because, as a precedent, the case would affect "many millions worth of land in California, which is otherwise public domain." He felt bound, also, in this connection to make no admission that the purchase by the United States operated as an assent to the alleged validity of the Castro grant (8 Op. A. G. 422, 424). Secondly, it is clear that there was no idea of depriving California of its swamp lands since the Attorney General was of the opinion, erroneously, as it appears from subsequent decisions of this court (*Beard* v. *Federy, supra; United States* v. *Coronado Beach Co.,* 255 U. S. 472, 487–488), that the claim of California would not be settled by the proceedings before the Land Board, and he, therefore, advised that before any expenditure be made towards improving Mare Island, California be asked to cede the claims it might have, if any, to the shores and overflowed land (8 Op. A. G. at 426). If his assumption were correct, California could not be defrauded. Thirdly, it is also clear from Cushing's opinion that his predecessor, Attorney General Crittenden, had thought that the claim of Bissell and Aspinwall was of such seriousness that it should be purchased and that he had apparently given no thought to any possible ownership on the part of California (pp. 422–423).

Despite repeated assertions to the contrary in the opinion below, the record shows that while the *Bissell and Aspinwall* case was pending, the United States fully disclosed to the District Court the fact that the Government had purchased the interests of the claimants. Thus at page 8 of the first volume of the "Transcript of the Proceedings in Case No. 307, G. W. P. Bissell and William H. Aspinwall, Claimants vs. the United States" (Exhibit C, original) the following entry is found:

> The United States being now the owner of the titles of appellees, a confirmation of this claim enures to the benefit of government, and no objection is therefore made to a decree in favor of the validity of the claims.

It may be noted, also, that this disclosure is substantiated in the opinion of the Circuit Court in the case of *Bouldin* v. *Phelps,* 30 Fed. 547, 578 (C. C. N. D. Cal. 1887) of which more will be said hereafter.[16] Accordingly, petitioner submits that the

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[16] In that case, Judge Hoffman, who tried the *Bissell and Aspinwall* appeal, concurred in Judge Sawyer's opinion, wherein it was stated with reference to the Bissell and Aspinwall proceedings (p. 578):

"Besides, before the order for confirmation, the United States had purchased in any adverse claim, that the petitioners had compromised the adverse claim, so that the confirmation, under the authorities cited, would inure to the benefit of the United States * * * It was upon this idea expressed by the United States Attorney at the time, that, he stated, that there was no further objection to a confirma-

extravagant statements made by the court below which accuse the United States of waging a "concealed non-adversary proceeding in simulated opposition against a faked opponent" (R. 994, 991, 976) are fanciful and unwarranted. The trial court in *Bissell and Aspinwall* v. *United States* was thoroughly advised of the relationship between the parties before it.

Further evidence of the good faith of the officials is shown in the proceedings in *Bissell and Aspinwall* v. *United States,* which, as was customary before such boards, were not elaborate. The testimony of witnesses Cooper (R. 222–226), McDaniel (R. 244–245), and Mizner (R. 245–247), which the Government brought out, and the cross-examination by the Government of claimants' witness Alvarado,

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tion; upon which statement, the order for a decree of confirmation was made."

The omitted portion of the quotation reads: "It had, therefore, become a matter of indifference to the United States, whether the claim should be confirmed or rejected, as in one case the confirmation inured to its benefit; and in the other, the legal title then in the United States, continued to remain in them, as before, without even any adverse outstanding equity." It will be subsequently demonstrated that this language cannot be construed to mean that the proceedings were non-adversary (*infra*, pp. 65–74). The part of the opinion following the quotation in the text discusses the effect of the judge's failure to sign the decree in the *Bissell and Aspinwall* case. The erroneous character of the conclusions suggested in this discussion has already been indicated (*supra*, p. 38, n. 14).

was such as to cast on the minds of the Board "strong suspicions" of the validity of the Castro grant (R. 277). Collusive litigants would not offer such damaging testimony, and consequently the charge made by the court below that the depositions taken in the proceedings "show a most perfunctory cross-examination of the witnesses" (R. 991) is entirely gratuitous. Furthermore, it is submitted, if fraud is to be predicated upon the belief that an adequate battle was not made, no decree will hereafter be safe from collateral attack.

Moreover, the court below had before it conclusive evidence that California knew of and had consented to the purchase of the Bissell and Aspinwall interests, in the terms of an act of consent passed by California on May 11, 1854 (California Statutes, 1854–55, c. 43), some months prior to the taking of testimony and a year prior to the decree of the Board. Section 1 consents to the purchase of Mare Island by the United States for naval purposes. Section 2, in addition to ceding certain other swamp lands, provides that this consent and grant shall not operate to the "aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made"—obviously referring to the Bissell and Aspinwall conveyance and the terms of their bond to the United States. There is no intimation anywhere in the proceedings of "any conveyance or bond * * * to the United States * * * heretofore made"

other than that of Bissell and Aspinwall (conveyance, R. 302; bond, R. 308). In other words, if the grantors did not make good their claims in the proceedings on the Mexican claim, the United States would not be precluded by this state statute from recovering under that portion of the bond which provided that the grantors "shall also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or *body politic*" (R. 310). [Italics supplied.] California was interested in aiding the United States in order to secure the establishment of the naval reservation, but at the same time took pains to make sure that its cession of interest to the United States would not deprive the Government of its rights under the bond and thus inure to the benefit of Bissell and Aspinwall.

Obviously, the imputation of collusion, bad faith, and fraud in the United States is wholly unfounded. Indeed, despite the lapse of eighty years, the record is remarkably clear as to the good faith of the Government.

(5) ***The United States was a mere donor and not a trustee for California; moreover, if the United States were a trustee, respondents as the successors of California are both estopped and barred by laches.***

It is the position of the Government that the United States, in resisting Mexican land claims under the Act of 1851, was not charged with the duties

of a trustee for California whenever swamp lands were involved, merely because they had been granted to California by general statute. Instead, the United States was a mere donor of the swamp lands and had not specified or ascertained what lands were swamp nor yet conveyed legal title. However, assuming that the United States was charged with the duties of a trustee, the successors of California are now estopped from attacking the conclusiveness of the decrees or the validity of the title purchased by the Government, because of full knowledge, acquiescence and consent. Moreover, again assuming not only that the United States was a trustee but that it violated its duty to its alleged cestui in purchasing the title of a private land claimant, the successors of California are now barred by laches from collaterally attacking the decrees—because no steps of any sort had been taken by them (for more than seventy years) to attack the decrees or (for more than fifty-seven years) to disturb the Government's possession, despite the fact that the United States unequivocally repudiated any trust duty imposed upon it, notoriously and exclusively occupying the trust res at all times since 1853 for military and naval purposes under claim of ownership.

a. *The United States a donor, not a trustee.*—The majority below adopted the untenable theory that, under the Swamp Act of 1850, the United States held legal title to the lands in question as trustee

for California. It therefore held that, since, as it assumed, the Government deliberately violated a trust duty to its cestui by purchasing Bissell and Aspinwall's interests, the United States could take no benefit from the decrees.

However, in order to create a trust relationship, an intention to assume the duties of a trustee must be either manifested or fairly implied from the facts (Restatement of the Law of Trusts, Secs. 2, 23). No provision in the Swamp Act of September 28, 1850, indicates that the United States either assumed any fiduciary relationship or in any way undertook to hold and protect these lands for the use and benefit of its grantees in the technical manner of a trustee. The Government was merely a donor. It was gratuitously divesting itself of parts of its domain for specific purposes and even then only to those who would comply with the conditions imposed by the Act. It may have passed on to the states a beneficial interest in the swamp land, but like a vendor of land who has not transferred legal title [17] or like an ordinary mortgagee holding legal title [18] the United States did not become a trustee in any sense.

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[17] *Rayner* v. *Preston*, 18 Ch. D. 1, 10; Restatement of the Laws of Trusts, Sec. 13; Williston, The Risk of Loss, 9 Harv. Law Rev. 106, 117n.; *cf.* 1 *Bogert, Trusts and trustees*, § 18.

[18] *Field* v. *Debenture Corp.*, 12 T. L. R. 469; *King* v. *State Mutual Fire Ins. Co.*, 7 Cush. (Mass.) 1, 7; *Dennett* v. *Tilton*, 227 Mass. 299; see *Taylor* v. *Russell* (1892), A. C. 244, 255; Restatement of the Law of Trusts, Sec. 9; 1 *Bogert op. cit.*, § 29.

Thus it has been held, despite the proviso to Section 2 of the Swamp Act to the effect that the proceeds of swamp lands sold by the state should be applied to reclamation by levees and drains, that no trust for this purpose was thereby attached to the lands. *Mills County* v. *Railroad Companies*, 107 U. S. 557. Similarly, under an 1855 statute providing that the proceeds of swamp lands sold by the United States subsequent to the passage of the 1850 statute should be paid over to the states, it was held that "the proceeds of the swamp lands are not subject to a property trust * * * in the hands of the United States." *United States* v. *Louisiana*, 127 U. S. 182, 191.

No authority has been found to intimate in any way that the United States was charged by the Act with the obligations of a trustee. Certainly neither the cases cited by the court below (R. 991–992) nor by the respondents (Br. in Opp., p. 10) give support to such a rule. Whether or not the United States was charged with the duties of a trustee for the benefit of its grantees under the Act in question or acts similar to it was not involved in any of these cases and they are clearly not in point.

It is true that there are general statements in some of the cases, upon which respondents rely, to the effect that the United States held legal title to public land grants "in trust" for settlers who had fully complied with the terms and conditions of the land laws, but it is obvious that the Court did not in any of them intend to hold, even if the issue

had been before it, that the United States was a trustee in the true sense of that term. Such language is a "loose inaccurate use of the word 'trust'," (*Bogert, op. cit.* § 18), just as it is frequently used in cases involving a vendor-vendee or mortgagor-mortgagee relationship. In neither of these situations is the vendor or mortgagor a trustee, as pointed out above.

Thus, in the case of a contract for the sale of land, the vendor himself has a security interest until the purchase price has been paid, and at no time are the remedies of the vendee exclusively equitable as are those of the ordinary beneficiary of a trust. He has a cause of action at law for breach of contract, of equal importance with his right to specific performance in equity. *Way* v. *Root,* 174 Mich. 418. Even after the whole purchase price has been paid, the equitable duty of the vendor to convey arises out of contract and not out of a trust (*Bogert, op. cit.* § 18, p. 76):

> Express trusts are created because of an actual intent that they shall exist, expressed by the settlor. It is a strained construction of an ordinary land contract to say that either seller or buyer actually intended that during the course of the execution of the contract either party was to be a trustee for the other.

The same is true in the case of a mortgagor-mortgagee relationship. In *Taylor* v. *Russell* (1892), A. C. 244, Lord Herschell said (p. 255):

> No authority was cited for the proposition that a mortgagee is, subject to his security, a trustee of the legal title for the mortgagor. The rights of a mortgagor are no doubt well established in a court of equity. He may redeem the mortgage, and no dealings with the property by the mortgagee, save a conveyance under the power of sale, can deprive him of this right. But it is quite a different proposition and one which I think is wholly untenable to assert that a mortgagee is trustee for the mortgagor. It is admitted that a mortgagee may create such estates as he pleases, he may convey, by way of sub-mortgage, to whom and in as many parcels as he pleases.

While it is true that in *Knight* v. *U. S. Land Association, supra,* this Court expressed the opinion that the United States held tide lands[19] acquired from Mexico "in trust" for the future state (p. 186), in the same breath it referred to the duty of the United States to the Mexican claimants (pp. 186, 200, 201) and said that the latter duty

[19] It is to be noted that there is a wide difference between tide lands and swamp and overflowed lands, which are uplands. As to tide lands, the Court said (p. 183), the original states and those admitted thereafter are possessed of "absolute property in, and dominion and sovereignty over, the soils under the tide waters * * * *Martin* v. *Waddell*, 16 Pet. 367, 410; *Pollard* v. *Hagen*, 3 How. 212, 229; *Goodtitle* v. *Kibbe*, 9 How. 471, 478; *Mumford* v. *Wardwell*, 6 Wall. 423, 436; *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65." *Cf. Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22, where this Court pointed out that "there is no question that the United States was free to convey the upland."

was superior to the former (pp. 186, 200, 201). Furthermore, here again it cannot be said from this loose use of the term "trustee" this Court meant that the United States was technically a trustee for anyone. Obviously, the only obligation of the United States was to see justice done. In the same sense it might be said that the United States holds all of its power in trust for its citizens. In such a sense, of course, the mere use of the word "trustee" cannot suspend the operation of the normal rules of law which govern the relations of the United States with the states and citizens, since then the technical field of trusts would supercede the whole body of public law.

Accordingly, it is submitted, the attempt of the majority of the court below to erect a trust relationship must fail completely and its conclusion that the United States consciously violated its duty to its cestui (R. 992) collapses.

b. *Even as cestuis, respondents are estopped.* Even if the Circuit Court were correct in its view that the United States was a trustee, the holding that the respondents may now attack the validity of the decrees is unsound. California, as has been shown above (pp. 51–52), by its act of cession and consent (California Statutes, 1854–55, c. 43, p. 48), freely and voluntarily consented to the purchase, with full knowledge of its extent and terms, and through its legislature actively cooperated to preserve the rights of the United States in the transaction. Therefore, respondents as the successors of California are now estopped from attacking or

otherwise repudiating the consent of their grantor, for it is a fundamental principle that a cestui, who, with full knowledge of the facts, has consented to or acquiesced in any conduct on the part of his trustee, is thereafter barred from objecting to such conduct or setting it up as a breach of trust. *Butterfield* v. *Cowing*, 112 N. Y. 486; *Pope* v. *Farnsworth*, 146 Mass. 339, 344; *Walker* v. *Doak*, 210 Cal. 30; *Turner* v. *Fryberger*, 99 Minn. 236; 4 *Bogert, op. cit.*, §§ 941, 942; Perry, Trusts and Trustees (7th Ed.), §§ 195, 849. Additional authorities to the same effect are cited in the margin.[20]

Under the authority of these cases it is submitted that the rule relied upon by respondents that a trustee is under an "absolute disability" from acquiring "a personal interest in the subject matter of the trust" (Br. in Opp. p. 10), has no application to the case at bar. As was said in *Ungrich* v. *Ungrich*, 115 N. Y. Supp. 413, affirmed 207 N. Y. 662 (p. 417):

> Of course, it is true as a bald proposition that a trustee cannot deal to his personal advantage with the property of his trust. It is likewise true that a cestui que trust cannot allege an act upon the part of his trustee to

[20] *Preble* v. *Greenleaf*, 180 Mass. 79; *In re Niles*, 113 N. Y. 547; *In re Hall*, 164 N. Y. 196; *Law* v. *Barnes* (R. I.), 116 At. 209; *Meier* v. *Union Trust Co.*, 93 Ind. App. 457; *In re Armitage's Estate*, 195 Pa. St. 582; *Cf. Laughlin* v. *Mitchell* (C. C. S. D. Miss.), 14 Fed. 382, aff., 121 U. S. 411; *Davis* v. *Harrison*, 240 Fed. 97 (C. C. A. 9).

> be a breach of trust which has been done under his sanction or procurement or concurrence. * * * The plaintiff having sanctioned and assented to the transaction and concurred in the transfer to the property * * * and having understood all the facts and no deception having been practiced upon him, he is bound by such sanction * * *.

See to the same effect *Colburn* v. *Hodgdon*, 241 Mass. 183; *Marcum* v. *Wallace*, 246 Ky. 746; *In re Bauer's*, 17 Cal. App. (2d) 426; Cf. *First Savings Bank & Trust Co.* v. *Greenleaf* (C. C. A. 8), 294 Fed. 467; *Cardoner* v. *Day*, 253 Fed. 572 (N. D. Ida.), aff. *Wilson* v. *Day*, 260 Fed. 788 (C. C. A. 9).

Accordingly, assuming the existence of a trust relationship, respondents as the successors of California are estopped by acquiescence and consent.

c. *Even as wronged cestuis, respondents are barred by laches.*—Furthermore, even if all that the court below assumed as to breach of duty by the United States as a trustee be conceded, California and its successors, as cestuis, could not stand by for an undue length of time while the United States made large expenditures in improving the land, and then hope to avoid the decrees [21] on the faith of

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[21] The rule that laches does not operate against a State (*Gaussen* v. *United States*, 97 U. S. 584; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389) is not applicable here because the claim originally held by California was transferred to Darlington in 1857 (R. 388) and has been owned solely by private persons since that time. See *Wilhoit* v. *Tubbs*, 83 Calif. 279.

which the improvements were made. Cestuis, as well as other litigants, may be barred, under the doctrine of laches, by reason of their long delay in seeking relief from the action of their trustees. *Bogert, op. cit.* p. 2742.

Thus, in *Wagner* v. *Baird*, 7 How. 234, 257–258, in affirming dismissal of a bill brought for the recovery of trust property, after a delay of forty years, this Court said:

> There is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations directly covers the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights or long acquiescence in the assertion of adverse rights. (2 Story, Eq., Section 1520). A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights. "Nothing," says Lord Camden (4 Bro. Ch., 640) "can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing." Length of time necessarily obscures all human evidence and deprives parties of means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession.

Since the United States was in open and undisputed possession of the land since 1853, respondents and their predecessors are now chargeable with lack of diligence. As this Court said in *Hume* v. *Beale's Executrix*, 17 Wall. (84 U. S.) 336, in affirming dismissal of a suit for alleged breach of trust, brought thirty-seven years after the act complained of (p. 349):

> Why have these complainants slept upon their rights for this great length of time and why have they delayed invoking the aid of a court of equity until a person charged with misconduct is dead? It is plain this unusual delay places them on the defensive, and requires satisfactory explanation before they can obtain relief.

In *Patterson* v. *Hewitt*, 195 U. S. 309, a suit to enforce a trust was dismissed because of eight years' delay in bringing it and the expenditure of large sums of money by the defendants in developing mining property there involved, although the period of the statute of limitations was ten years. The Court said:

> Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The

> statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed, complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay.

Additional authorities to the same effect are cited in the margin.[22]

Respondents may not take refuge under the protecting cloak spread by courts of equity over cestuis who are unaware of the repudiation of their trust, for California and all its successors well knew that the United States claimed this land for its own use in the conduct of its military and naval operations, notoriously disavowing any trust re-

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[22] *Percy* v. *Cockrill*, 53 Fed. 872, 875 (C. C. A. 8) (fifteen years); *Froneberger* v. *First Nat'l Bank*, 203 Fed. 429 (C. C. A. 4) (forty years), and the following California cases which gave effect to the same doctrine: *Kleinclaus* v. *Dutard*, 147 Cal. 245, 249 (thirty-five years); *Cowan* v. *Union Trust Co.*, 38 Cal. App. 203, 204 (three years); *Baxter* v. *King*, 96 Cal. App. 415 (thirty-nine years); *Lichtenberg* v. *Burdell*, 101 Cal. App. 20, 48 (twenty-four years).

lationship which may have been imposed upon it.[23] This being true, a delay many times over that prescribed by the statutes of limitation of California (California Code of Civil Procedure, §§ 318, 338, 343)[24] for barring causes of action has barred respondents and their predecessors from attacking the decree of confirmation rendered in *Bissell and Aspinwall* v. *United States* in 1857. *Phillipi* v. *Phillipe,* 115 U. S. 151, 156–157; *Speidel* v. *Henrici,* 120 U. S. 377, 386.[25]

Nor may the imputation of laches be avoided by any contention that respondents and their predecessors "have actively and continuously asserted their rights" ever since 1873 (Br. in Opp. p. 12). As has been shown (*supra,* pp. 27–29), the record affords no basis for such a contention. Respondents or their predecessors took no steps to assert their rights. The road was open to California, to Darlington, and all their successors, to pursue the remedy obtained in *Work* v. *United States,* 23 F. (2d) 136 (App. D. C.). But respondents did not even attempt court proceedings prior to the unsuccessful ejectment action, *Sawyer* v. *Osterhaus,* 212

[23] "Laches is not excused by simply saying 'I did not know.' If by diligence a fact can be ascertained the want of knowledge so caused is no excuse for a stale claim." *Taylor* v. *Coggins,* 244 Pa. 228, 231; *Redford* v. *Clark,* 100 Va. 115, 122.

[24] See note 11, page 26, *supra.*

[25] See, to the same effect, *Swift* v. *Smith,* 79 F. 709, 714 (C. C. A. 8) (twenty years); *Robb* v. *Day,* 90 F. 337 (C. C. A. 6) (twenty-three years); *Benedict* v. *City of New York,* 247 F. 758, 767 (C. C. A. 2) (seventeen years); *Ewald* v. *Kierluff,* 175 Cal. 363 (forty-three years).

Fed. 765 (N. D. Cal.), instituted in 1910. See *Work* v. *United States, supra,* p. 137. They made only two protests, the first twenty-six years after the United States had taken possession, and the second thirty-one years later.

Under such circumstances, the decision of this Court in *Wagner* v. *Baird,* 7 How. (48 U. S.) 234 258, is precisely applicable. In that case the Court said:

> Long acquiescence and laches *by parties out of possession* are productive of much hardship and injustice to others and cannot be excused but by showing some actual hinderance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor. The party guilty of such laches cannot screen his title from the just imputation of staleness *merely by the allegation of an imaginary impediment or technical disability.* [Italics supplied.]

Respondents having slept too long on their rights, if any, equity will not permit them to attack the decrees. *Hammond* v. *Hopkins,* 143 U. S. 224, 250; *Wetzel* v. *Minnesota Railway Company,* 169 U. S. 237; *Clark* v. *City of Chicago,* 70 F. (2d) 172, (C. C. A. 7).

(6) *There was no lack of required adversary proceedings.*

It is the position of the Government that the record here presented shows that the requirements of adversary proceedings were fulfilled throughout

the proceedings before the Board and on appeal before the District Court, and that, in any event, the Board was an administrative tribunal empowered to dispose of land claims even upon ex parte procedure.

As another ground for ruling that the United States can take no benefit from the decree in the case of *Bissell and Aspinwall* v. *United States,* the court below held that (R. 971):

> the decree is not binding upon appellants because it was given in a non-adversary action in which the claimant and defendant were one, and hence no justiciable issue existed upon which adjudication could be had

and that (R. 1004):

> the motion to strike from the evidence the judgment and record in the *Bissell and Aspinwall* case should have been granted, because, as soon as the Castro title was acquired by the United States, that case presented no issue of an adversary character upon which the District Court or the Land Board could take jurisdiction.

These rulings are clearly erroneous for several reasons.

a. *There was a genuine controversy.* –Above, in discussing the charge of bad faith, facts and considerations have already been set forth which conclusively demonstrate that the proceedings both before the Board and the District Court were based upon a genuine controversy (*supra,* pp. 46–52). Among those considerations was the fact that Bis-

sell and Aspinwall were under bond for $[illegible]00,000.00 to furnish a good title to the United States (R. 308). Had the claim been declared invalid, the United States could at the least have recovered the purchase price of $83,491.00 (R. 303). Furthermore, the United States felt bound to resist the claim in order to defeat a precedent which would affect "many millions worth" of public land (*supra*, p. 46).

It seems unnecessary to dwell further on these matters, and the facts adduced above should fully dispose of the point. There are, however, further considerations.

b. The decree of the Board.—The purpose of the Mexican Claims Act, under which the Bissell and Aspinwall proceedings were brought, was expressed in its title: "An Act to Ascertain and Settle Private Land Claims in California"—a function requiring no controversy. The view of the majority below (R. 1000), that the Board's duty was to dispose of justiciable issues between adverse litigants, both disregards the express purpose of the Act and ignores the applicable decisions of this Court. The Board was an administrative tribunal. *United States* v. *Ritchie*, 17 How. (58 U. S.) 525; *Grisar* v. *McDowell*, 6 Wall. (73 U. S.) 363; *United States* v. *Fossatt*, 21 How. (62 U. S.) 445. Since the statute under which it was created did not require adversary proceedings, none were necessary. *Foster* v. *Neilson*, 2 Pet. (27 U. S.) 253; *Tameling* v. *U. S. Freehold, Etc. Co.*, 93 U. S. 644.

The court below seems (R. 1000) to have been misled by the provision of the Act providing for the attendance of an "agent" of the United States. This provision, however, looked only to the presence of a representative of the Government to "superintend the interests of the United States in the premises" (Sec. 4). Even had there been provision for the participation of regular law officers of the United States—such as the Attorney General and the United States Attorneys—this would not have determined the nature of the proceedings.

Nor is there anything in Sections 9 and 10 of the Act providing for a procedure for a review of the decrees of the Board, which justifies the interpretation put upon the Act by the court below (R. 1000–1001). Merely because Congress has provided for review by constitutional courts, where such review may fail because it is wanting in adversaries, it does not follow that the decree of the administrative tribunal will also fail. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Radio Commission* v. *General Electric Co.*, 281 U. S. 464; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *Ex Parte Bakelite Corp.*, 279 U. S. 438. Particularly is this the case where, as here, the tribunal is set up to determine the political or international obligations.[28]

[28] The situation here is different from that disclosed in *Muskrat* v. *United States*, 219 U. S. 346, and similar cases cited by the court below (R. 1004). The natural presump-

To support its view that a justiciable controversy was required, the majority below were obliged to rely on general language from cases in which the question was not involved (R. 1001) such as *Botiller* v. *Dominquez,* 130 U. S. 238, 250; *Grisar* v. *McDowell,* 6 Wall. (73 U. S.) 363, 374; *Beard* v. *Federy,* 3 Wall. (70 U. S.) 478, 480; *United States* v. *Throckmorton,* 98 U. S. 61, 64. That this Court does not think adversaries were necessary is clear. In *Meader* v. *Norton,* 11 Wall. 442, 451–52, the Court said:

> Applicants for such confirmations were required to present their claims to the commissioners when sitting as a board, but the act of Congress made no provision for notice to any adverse claimant, and the proceedings before the commissioners were wholly ex parte unless opposed by the district attorney.

And in *United States* v. *Fossatt, supra,* the Court said (pp. 450–451):

> The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct

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tion there that a constitutional court is the proper tribunal to decide a constitutional question does not apply here where the problem is the administrative determination of political obligations. There is nothing in the present Act to indicate that the court should reach a different result from that in *Keller* v. *Potomac Elec. Co.; Radio Comm.* v. *General Electric Co.; Postum Cereal Co.* v. *California Fig Nut Co.; Ex Parte Bakelite Corp.*, cited in the text.

their executive Government to comply with that obligation.

For other decisions approving the determination of private land claims without adversary proceedings, see instances where statutes provided simply for a final determination of claims by Congress subsequent to administrative investigations and reports, by a special commission (*Henderson* v. *Poindexter,* 12 Wheat. 530) or by a surveyor general (*Tameling* v. *U. S. Freehold, Etc., Co.,* 93 U. S. 644, 662).

It would seem clear, therefore, that so far as the proceedings before the Board are concerned no adversaries are necessary to support the validity of its decrees. Indeed, in many of its proceedings there was a mere nominal appearance by the agents of the United States, who decided to offer no testimony or argument in behalf of the Government. The determination of the merits in such instances was left to the Board with only the petitions and proofs of the claimants before it. Yet the Board rejected some claims even under these circumstances.[27]

c. *The decree of the District Court.*—So far as the decree of the District Court in *Bissell and Aspinwall* v. *United States* is concerned, it is submitted that the decree is not now subject to collateral attack by respondents here on the ground that

[27] Mss. Transcripts of Proceedings in Land Cases before the Board of Commissioners in California, 1852–1856, The National Archives.

the court had no jurisdiction in the *Bissell and Aspinwall* case. There is authority for the proposition that the court does not lose jurisdiction, so that its decree is subject to collateral attack, merely because at a stage of the proceedings the claim of one adversary has been purchased by his opponent. *Schmertz Wire Glass Co.* v. *Western Glass Co.*, 178 Fed. 977, 986–988 (C. C. N. D., Ill.), approved on appeal although affirmed on another ground, 185 Fed. 788 (C. C. A. 7); *Colman* v. *Hathaway*, 285 Fed. 602, 604 (D. Mass.).[28] Apart from this consideration, however, the Bissell and Aspinwall decree would not be without effect even if the proceedings before the District Court had in fact been non-adversary in character, for the following reasons:

1. The Mexican Claims Act established the Board and provided in Section 9 for review of its decisions by the District Court. Either the claimant or the United States, if dissatisfied with the rejection or confirmation of a Mexican claim, could "present a petition to the District Court * * * praying the said court to review the decision." It

[28] *Lord* v. *Veazie*, 8 How. 251, 256, and *Cleveland* v. *Chamberlain*, 1 Black 419, on which the court below bases its opinion, are not in conflict with petitioner's contention. Those cases did not involve the validity of a decree which the court had rendered, since the court did not proceed to a decree but adopted one of the other alternatives suggested in the *Schmertz* case cited in the text. Furthermore, these were cases of fraud upon the court. Here, as noted in the text (pp. 49–50) there was no concealment from the court.

is plain that a decision from which no review was sought was fully as conclusive as one which had been affirmed on review by the District Court or by the Supreme Court. Accordingly, even if the District Court were without jurisdiction because the parties were not true adversaries, the decree of the Board would stand unaffected by the fact that the decree of affirmance might be subject to collateral attack.

2. Moreover, even if the proceedings in the District Court were not between adversaries and even if it were necessary that the District Court have jurisdiction if the decree of the Board were to stand, the respondents cannot attack a decree which has settled property rights for a period of almost three-quarters of a century. For, they are barred by laches since they (and their grantor) stood by while the United States reclaimed and improved the property; and they are estopped since their grantor acquiesced in the taking of the lands. (*Supra*, pp. 58–65.)

As this Court, in affirming a judgment dismissing an action of ejectment, *Kirk* v. *Hamilton*, 102 U. S. 68, 78–79, said with reference to an attack upon prior judicial proceedings:

> The plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid

> transfer of his right of property * * * Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true and upon the faith of which others acted.

The court quoted with approval (pp. 76–78) a statement by Chancellor Kent in *Wendell* v. *Van Rensselaer*, 1 Johns. (N. Y.) Ch. 344, 354, which exactly fits the instant case:

> There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.

Additional authorities to the same effect are set forth in the margin.[29]

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[29] *Simons* v. *Burlington &c. Railway Co.*, 159 U. S. 278, 291; *Abraham* v. *Ordway*, 158 U. S. 416, 420, 421; *Burrow* v. *Carley*, 210 Cal. 95; *Pacific Imp. Co.* v. *Carriger*, 136 Cal. xix, fully reported in 68 Pac. 315, 318–319; *Godeffroy* v.

Accordingly, it is submitted that the decree of the District Court in *Bissell and Aspinwall* v. *United States* is not now subject to attack for want of adversary parties.

(7) *The validity of the Castro grant cannot now be reexamined as an original matter.*

Respondents assert "that the Mexican grant under which it [the United States] asserts title is, in fact, fraudulent" (Br. in Opp. p. 7), and the court below sought to retry as an original matter the validity of the grant Castro claimed from Governor Alvarado (R. 973–981). However, the existence, the validity, and the extent of the Castro grant—as conveyed to Bissell and Aspinwall and by them to the United States—were "forever foreclosed" when those matters were determined by the Board and the District Court eighty years ago. *More* v. *Steinbach*, 127 U. S. 70, 82–83; *United States* v. *Workman*, 1 Wall. 745. As this Court said, through Mr. Justice Field, in *Beard* v. *Federy*, 70 U. S. 478, 492–493:

> If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correct-

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Caldwell, 2 Cal. 489, 492. An exhaustive annotation of cases to the same effect is set forth in 50 A. L. R. 672, 685, 878, 966, 967. See also Ann. Cas. 1913 C. 60; 39 L. R. A. (n. s.) 500; *Ewart*, Estoppel, pp. 88–92.

> ness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit, and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation.

This Court has assiduously protected the property rights of those who base their title upon confirmed Mexican grants, and in every instance has repelled such forays as respondents attempt in the present case. Even the United States may not impugn such grants, for as the Court said in *United States* v. *Throckmorton*, 98 U. S. 61 (pp. 68–69):

> The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. * * *
>
> The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the

> District Court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.

See also *Thompson* v. *Los Angeles Farming & Milling Co.*, 180 U. S. 72.

The inequities and injustices which would result from departing from these decisions and at this late date requiring those claiming under a Mexican grant originating a century ago to prove the validity of the original conveyance are apparent. Through the long passage of years, grantors and contemporary witnesses have died, documentary evidence of every sort has been lost or destroyed, and those who would be required, under the theory of respondents, to establish again the validity of the title conveyed by their original grantor, would be wholly prevented from asserting their claims.

As this Court has frequently pointed out, in the cases cited *supra*, Congress has carefully guarded against any such eventuality by providing a pro-

cedure for conclusively establishing the validity of a Mexican grant for all time to come against the whole world. Indeed, this Court has held that even a perfect Mexican title, as distinguished from an inchoate one, even though genuine in all respects, may no longer be asserted in the courts of this country unless it was presented and confirmed under the Land Commission Act. *Botiller* v. *Dominquez,* 130 U. S. 238. In that case this Court established the principle (pp. 255–256):

> that no title to land in California, dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851; or, if rejected by that board, confirmed by the District or Supreme Court of the United States.

The Court quoted (p. 252) from the opinion of Chief Justice Taney in *Fremont* v. *United States,* 17 How. 542, 553, wherein it was said:

> It will be seen from the quotation we have made, that the 8th section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination and to be passed upon by the court. The object of this provision appears to be, to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy.

It is therefore submitted that the existence, validity, or extent of the Mexican grant under which petitioner has acquired title present questions that are wholly irrelevant to the determination of the instant case, and respondents may take no comfort from the dicta in *Bouldin* v. *Phelps,* 30 Fed. 547, in which the grant from Governor Alvarado to Castro is said to be fraudulent. Petitioner was not a party to that case, which was brought solely against the naval officers in possession of Mare Island. The validity of the Government's title to Mare Island was not involved, for it is a familiar principle that in ejectment the plaintiff must recover upon the strength of his own title and not upon any weakness in the defendant's. In no sense, then, is *Bouldin* v. *Phelps* res adjudicata as to the present case, and the accusation by the court below, charging the United States with a "purposeful shift of position" (R. 978), is without justification. In the *Bouldin* case, as in the *Bissell and Aspinwall* case, the Government urged that the Castro grant was fraudulent. Having purchased the rights of Bissell and Aspinwall, the Government is entitled to rest on the decree in that case without being charged with improper conduct.

Accordingly, it is submitted as conclusively established by the repeated and express rulings of this Court that the validity of the Castro grant cannot be examined now as an original matter.

III

THE SWAMP ACT DID NOT GRANT TO CALIFORNIA ANY TITLE TO LANDS CLAIMED, WHEN THE ACT WAS PASSED, UNDER A MEXICAN GRANT

Wholly aside from the foregoing principal questions of adverse possession or the conclusiveness of the decrees, it is the position of the Government that the Swamp Act did not grant to California any title to the lands here in question because that Act applied only to lands which, at the time it was passed, were public lands; that California lands as to which there were Mexican claims outstanding (such as the Castro claim) were not public lands but were reserved and excepted from disposal by the United States; and that, hence, respondents' asserted source of title, the Swamp Act, passed no interest to California or California's grantees.

Swamp Act operative only in praesenti.—In a line of decisions and in a variety of circumstances this Court has steadily held that the Swamp Act was a grant to the states *in praesenti;* that is, effective only unconditionally and at the time of the approval of the act, September 28, 1850. This position was aptly summarized by Mr. Justice Van Devanter speaking for this Court in *United States* v. *Minnesota,* 270 U. S. 181, 202–203, as follows:

> By the act of September 28, 1850, Congress granted to the several States the whole of the swamp lands therein then remaining unsold, c. 84, 9 Stat. 519. The first section

> was in the usual terms of a grant *in praesenti*, its words being that the lands described "shall be, and the same are hereby, granted." The second section charged the Secretary of the Interior with the duty of making out and transmitting to the governor of the State accurate lists and plats of the lands described, and of causing patents to issue at the governor's request; and it then declared that on the issue of the patent the fee simple to the lands should vest in the State. * * * The question soon arose whether, in view of the terms of the first and second sections, the grant was *in praesenti* and took effect on the date of the Act, or rested in promise until the issue of the patent and took effect then. The then Secretary of the Interior, Mr. Stuart, concluded that the grant was *in praesenti* in the sense that the State became immediately invested with an inchoate title which would become perfect, as of the date of the Act, when the land was identified and the patent issued, 1 Lester's Land Laws, 549. That conclusion was accepted by his successors, was approved by the Attorney General, 9 Op. 253, was adopted by the courts of last resort in the States affected, and was sustained by this Court in many cases.

It is not anticipated that this rule, with which the court below is in accord (R. 1009), will be controverted. Indeed, since the land here in controversy was reserved for naval purposes by presidential orders in November 1850, (R. 328–329) and again

in 1853 (R. 381), long prior to the issuance of any patent for the lands under the Swamp Act, the title of the United States would be clear if that Act were not a grant *in praesenti*.

The general principle respecting grants *in praesenti* has been rigidly applied so that such grants could not be made operative either to confer swamp lands upon states admitted to the union after the date of the Swamp Act (*Rice* v. *Sioux City & St. Paul R. R. Co.*, 110 U. S. 695) or to apply to other types of lands which became part of the public domain after the date of the granting act. Lands which revert to or become a part of the public domain after the passage of the granting act and before the performance of conditions precedent by the grantee, such as the identification or survey of the lands or the location or partial completion of a line of railroad where railroad grants are involved, do not pass. Thus, lands subject to use and occupancy by an Indian tribe have been held exempt from the operation of a railroad land grant, even though subsequently an Indian tribe by treaty relinquishes its right to lands and removes therefrom before the railroad has become entitled to select its granted lands. *Leavenworth Etc. R. R. Co.* v. *United States*, 92 U. S. 733, 749.

In *Leavenworth, Etc., R. R. Co.* v. *United States, supra,* this Court stated the rule as to grants *in praesenti* and the reasons for it as follows (741–742):

> these grants have always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal * * *.
>
> Such grants could not be otherwise construed; for Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts * * *.

The rule and the reasons have been found by this Court to be applicable to lands claimed under Mexican grants in California.

Lands subject to Spanish or Mexican claims.— The same rule has been applied to lands subject to Spanish or Mexican claims (such as the claim here involved) at the time of grants *in praesenti* to railroads, even though the claims were later rejected so that the lands became a part of the public domain. Thus, in *Newhall* v. *Sanger,* 92 U. S. 761, 763–765, this Court denied the application of a railroad grant, as to California lands subject to Mexi-

can claims later rejected under the Mexican Claims Act as invalid. There the Court said (763–765):

> It was not until March 3, 1851, that our government created a commission to receive, examine, and determine them. As the operations of our land system, had it then been extended to California, would have produced the utmost confusion in titles to real estate within her limits, it was wisely withheld by Congress, until such claims should be disposed of. The act of that date declared that all lands, the claims to which should not have been presented within two years therefrom, should "be deemed, held, and considered to be a part of the public domain of the United States." This was notice to all the world that lands in California were held in reserve to afford a reasonable time to the claimant under an asserted Mexican or Spanish grant to maintain his rights before the commission. * * *
>
> Claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a com-

> petent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected.

The opinion is quite clear that (1) lands claimed under a Mexican grant were, even prior to the Mexican Claims Act, reserved from disposal by the United States as public lands; (2) Section 13 of the Mexican Claims Act recognized this principle in providing a two-year period within which claims should be presented to the Board and providing that claims not so presented or rejected by the Board should become a part of the public lands; and (3) the reason for this principle was that the duty of the United States to Mexican claimants could not fairly be discharged except "by prohibiting intrusion upon the claimed lands until an opportunity was afforded" for a determination of their claims.

In *United States* v. *McLaughlin*, 127 U. S. 428, 449, 451, this Court applied the general rule to California lands subject to a Mexican claim, despite the fact that, subsequent to the date of the railroad grant involved, the Mexican claim had been found to be "a wretched fraud":

> We can well understand that Indian reservations and reservations for military and other public purposes of the government should be considered as absolutely reserved and withdrawn from that portion of the public lands which are disposable to purchasers

> and settlers—for, in those cases, the use to which they are devoted, and for which they are deemed to be reserved, extends to every foot of the reservation. The same reason applies to Mexican grants of specific tracts, such as a grant for all the land within certain definite boundaries named, or all the land comprised in a certain rancho or estate.

The Court also (p. 454, 455) reaffirmed the reasoning in *Newhall* v. *Sanger* as "entirely conclusive," and restated that decision as follows:

> The lands comprised in a Mexican grant, it was held, must be regarded not as "public lands" but as "reserved" lands, because, by the treaty with Mexico, all private property was to be respected. And when the Act of March 3d, 1851, created a board of commissioners to examine all claims to Mexican grants, the 13th section declared "that all lands the claims to which have been finally rejected by the commissioners in the manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the commissioners within two years after the date of this act, shall be deemed, held, and considered, as part of the public domain of the United States," 9 Stat. 633; implying that until then they were not part of the public domain.

See to the same effect *Doolan* v. *Carr*, 125 U. S. 618. The rule of these decisions was applied to the Swamp Lands Act by the Supreme Court of Cali-

fornia in *Shanklin* v. *McNamara,* 87 Cal. 371. There the state court held that lands claimed under a Mexican grant were impliedly excepted from the grant of swamp lands to the state, despite the fact that the claim as finally confirmed excluded the lands.

In the latter case, the Supreme Court of California pointed out that (p. 383):

> It cannot be presumed that Congress would have granted directly and unconditionally to a person a tract of land of which the United States did not have the absolute and uncontrolled title, so that its grantee might at once take possession.

Certainly an unconditional grant *in praesenti,* as the Swamp Lands Act was, presupposes that the United States has full title and that its grantee can immediately take possession, or can at least proceed to perfect his title. But even assuming that the grant to Castro was invalid, or even fraudulent, his claim could only be extinguished by a final adjudication of the Board of Land Commissioners, in a proceeding to which the grantee of the United States would not be a party and over which it would have no control. Until this proceeding was terminated, the land could not properly be said to be a part of the public domain intended to be subject to disposal by the United States.

It may be noted that the bare existence of the decision in *Shankin* v. *McNamara,* not mentioned

by the court below, is a complete and eloquent answer to the assertion of that court (R. 1009) that California land titles would be seriously unsettled by a holding that the Swamp Lands Act did not apply to lands claimed under Mexican grants.

Floating grants an immaterial exception to the rule of Newhall v. *Sanger.*—The earlier cases held that all lands within a Mexican claim of any sort were impliedly exempted from grants by the United States. *Newhall* v. *Sanger, supra; Van Reynegan* v. *Bolton,* 95 U. S. 33; *Shanklin* v. *McNamara, supra.* Later cases, however, found it necessary to draw a distinction between grants which definitely identified the land granted and so-called "floating grants"—that is, grants of a given area within a much larger area. It became evident that, if the rule of *Newhall* v. *Sanger* were applied to all the land within the boundaries of floating grants, immense tracts would be excepted from the operation of the land laws. A "floating" grant, therefore, came to be treated as a promise to make a grant within the stated boundaries,[20] and a grant

[20] "Mexican grants were of three kinds: (1) grants by specific boundaries, where the donee is entitled to the entire tract, whether it be more or less; (2) grants of quantity, as of one or more leagues within a larger tract described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more; (3) grants of a certain place or rancho by name, where the donee is entitled to the whole tract according to the boundaries given, or if not given, according to its extent as shown by previous possession. *Higueras* v. *United States,* 5 Wall. 827, 834. In the first and third kinds, the claim of the grantee extends to

by the United States was held to apply to land within the boundaries of a floating grant, so long as a sufficient quantity of land remained ungranted within those boundaries to satisfy the rights of the Mexican grantees. *Doolan* v. *Carr,* 125 U. S. 618, 632; *United States* v. *McLaughlin,* 127 U. S. 428, 448–457; *Carr* v. *Quigley,* 149 U. S. 652, 657–662. The rule of *Newhall* v. *Sanger* remained in force as to grants which definitely identified the land granted. *United States* v. *McLaughlin, supra,* p. 455.

However, it is clear that the grant to Castro was not a "floating" grant. It was for "the Island named 'La Yegu' * * * in all its extent * * *" (R. 250–251.) "La Yegu" was the Spanish name for Mare Island. The distinction with respect to floating grants is stated here merely to facilitate an understanding of the language of the cases.

Decisions on Mexican claims to lands in New Mexico not controlling.—As authority for its decision that lands subject to Mexican claims, subsequently shown to be invalid, were not reserved

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the full limits of the boundaries designated in the grant or defined by occupation; but in the second kind, a grant of quantity only, within a larger tract, the grant is really a float, to be located by the consent of the government before it can attach to any specific land, like the land warrants of the United States * * * It is the option of the government, not of the grantee, to locate the quantity granted; * * *" (*United States* v. *McLaughlin,* 127 U. S. 428, 448, 449.)

from the operation of the Swamp Act, the court below relied upon *Lockhart* v. *Johnson*, 181 U. S. 516, and *Lane* v. *Watts*, 235 U. S. 17, decisions dealing with Mexican claims to lands in New Mexico.

A summary of the legislation with respect to Mexican claims to land in New Mexico, upon which these two cases depend, will facilitate an understanding of them. The Act of July 22, 1854, 10 Stat. 308, created the office of Surveyor General of the Territory of New Mexico and Section 8 of that Act directed that official to investigate all Mexican claims to land in New Mexico and to make a report of such claims, together with his decision as to their validity, to Congress, which would confirm or reject them. Section 8 further provided that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government." In 1891, Section 8 was specifically repealed by 26 Stat. 854, Sec. 15. The latter Act established the Court of Private Land Claims for the litigation of Mexican claims to lands in New Mexico, and Section 14 provided that, if it should appear in any suit in the Court of Private Land Claims that land decreed to a claimant under a Mexican grant meanwhile had been granted by the United States to any other person, the title from the United States should remain valid, but the Court should render a money judgment in favor of the Mexican claimant and against the United States for the value of the land.

Two major differences between this legislation and that for California will be noticed. In the first place, the legislation for New Mexico contained no requirement that Mexican claims be presented within any period of time. In the second place, the Act of 1891 not only repudiated for New Mexico the rule of *Newhall* v. *Sanger,* but went so far as to validate grants of lands by the United States which were void when made because within even a *valid* Mexican claim.

Lockhart v. *Johnson,* 181 U. S. 516, dealt with a location made under the mining laws upon land which was, at the time of the location, claimed under a Mexican grant subsequently held not to include the land. The location was made after the enactment of the Act of 1891, and the court held the location was not invalid by reason of the existence of the Mexican grant because Section 8 of the Act of 1854 had been repealed. The court went on to say that the principle embodied in Section 8 did not exist apart from statute.

The question in *Lane* v. *Watts,* 235 U. S. 17, was whether a floating grant by the United States itself "to vacant land, not mineral, in the Territory of New Mexico" included lands as to which there existed, at the time of the grant, Mexican claims which had not then been disclosed or presented to the Surveyor General (and which, on subsequent presentation, were rejected in part). The court said that Section 8 of the Act of 1854 had been repealed, that the rule expressed in that section did

not exist apart from statute, and that in any event Section 8 did not reserve lands claimed under a Mexican claim from disposal by the United States until the claim had been presented to the Surveyor General.

These decisions are not at variance with the position of the Government herein. In *Newhall* v. *Sanger* this Court held that lands claimed under Mexican claims were not included in grants of public lands by the United States. This rule, the Court said, was necessary to do justice to the Mexican claimants. Indeed, it said that the duty of the United States to those claimants "could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded" for determination of their claims (92 U. S., at 764). It pointed out that the principle had been recognized by Congress in Section 13 of the Mexican Claims Act and in the Act of March 3, 1853, 10 Stat. 226, introducing the public land system into California. To the same effect, see *United States* v. *McLaughlin*, 127 U. S. 428, 454, 455.

This canon of interpretation could, of course, whatever its origin, be changed by Congress. And Congress did change it for New Mexico. The Act of 1854 did not require Mexican claims to lands in New Mexico to be presented within any definite time. In view of that fact, it would have been un-

reasonable to regard Mexican claims, unrevealed and unpresented, as withholding lands from the category of public lands. Moreover, Section 8 of the Act of 1854, unlike Section 13 of the Mexican Claims Act, was susceptible of the interpretation that lands claimed under asserted Mexican grants were withdrawn from the category of public lands only when the Mexican claim was presented, and not before. That interpretation was adopted by this Court in *Lane* v. *Watts*. Then Congress, by the Act of 1891, expressly repealed Section 8 and thereby wholly abrogated even the limited application which Section 8 had allowed the principle of construction adopted for California in *Newhall* v. *Sanger*. Indeed, Congress went so far as to validate grants by the United States of land within even *valid* Mexican claims, providing, in lieu of the lands, monetary compensation for the Mexican grantees.

But Congress has never altered the principle of construction adopted in *Newhall* v. *Sanger* for California. It recognized it in 1851 and again in 1853 and neither act has been repealed. It may be admitted that, on the question whether that construction was proper independently of statute, the language of the decisions is conflicting. *Newhall* v. *Sanger* and *United States* v. *McLaughlin* dealing with California said that it was. *Lockhart* v. *Johnson* and *Lane* v. *Watts*, dealing with *New* Mexico, said that it was not. It is submitted that *Newhall* v. *Sanger* and *United States* v. *Mc-*

Laughlin state the correct principle with respect to California and that the Court below herein has fallen into error in applying the New Mexico rule to California.

CONCLUSION

It is of great importance, both to the United States and to California land owners generally, that the attack upon the validity of decrees rendered pursuant to the Mexican Claims Act be rejected. The decision below at least contains the seeds of uncertainty with respect to California land titles. Eighty-six years ago Congress set up the Board of Land Commissioners to pass upon the validity of land held or claimed under Mexican grants. This Court has frequently held that a determination by the Commissioners was conclusive against the United States, California, or anyone claiming under either of them. Now, the Circuit Court of Appeals declares that at least in some ill-defined circumstances the decisions of the Land Commissioners are not conclusive against California or persons claiming under it. If this decision stands, holders of title unquestioned for generations are threatened with harassment and possible eviction.

More particularly, so far as the United States is concerned, the lands involved are important. The United States has been in undisturbed possession for seventy-three years. It has expended two million dollars developing the lands here involved as

an integral part of the Mare Island naval base (R. 1009), and we are informed that expenditures on other parts of the island exceed forty million dollars.

It is respectfully submitted that the judgment be reversed and the cause be remanded to the court below with directions to affirm the judgment of the trial court.

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APPENDIX

Act of September 28, 1850, c. 84, 9 Stat. 519:

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted,* That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted,* That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation,"

shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted,* That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

Approved, September 28, 1850.

Act of March 3, 1851, c. 41, 9 Stat. 631:

Chap. XLI. An Act to ascertain and settle the private Land Claims in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted,* That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted,* That such clerks, not to exceed five in number, as

may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted,* That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted,* That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the

said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted,* That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted,* That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted,* That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the

district in which such decision shall be rendered.

SEC. 9. *And be it further enacted,* That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the

original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted,* That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted,* That the commissioners herein-provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted,* That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted,* That all lands the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public

lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted,* That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the

same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town or village.

SEC. 15. *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted*, That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted*, That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dol-

lars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted,* That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

Approved, March 3, 1851.

California Statutes, 1854–1855, pp. 48–49, Chapter XLIII (Passed May 11, 1854):

AN ACT declaring the Consent of the Legislature of the State of California to the Purchase by the United States of Signor, or Mare Island; to relinquish the Title and Interest of the State in overflowed portions of said Island, and to vest the Jurisdiction over the same in the United States, for the purposes therein specified. [Passed May 11, 1854.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The consent of the State of California is hereby given to the purchase by the United States of a certain tract or parcel of land situated in the county of Solano, known as Signor or Mare Island, for the purpose of erecting and maintaining thereon such arsenals, magazines, docks,

dock-yards, and other military and naval structures as may be required for the use of the Government of the United States.

SECTION 2. The title and interest of the State of California to, and in such portions of the Island described in the preceding section as are overflowed beach, or swamp lands, on the eastern shore of the said Island, from the southern point thereof to a parallel intersecting the northern point of the highlands, and extending into the waters of the bay or straits, washing the eastern shore of said highlands of the Island to ship channel, is hereby relinquished and granted to the United States for the purposes specified in the preceding section; and the jurisdiction of such part of said Island, and the overflowed portions of the eastern shore thereof as are south of a parallel intersecting the northern point of the highlands, is hereby ceded by the State of California to the United States for the purposes aforesaid: *Provided*, That the consent to the purchase, and the grant and relinquishment of title, by this State to the United States, in this Act contained, shall not be construed in aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made, or which may hereafter be made, by any person or persons, company or corporations, or as a recognition on the part of the State of California of any claim, title or grant heretofore asserted or set up, or which may hereafter be asserted or set up by any person or persons, company or corporation.

SECTION 3. The jurisdiction ceded to the United States in the last preceding section is upon the express condition that the State of California shall retain a concurrent juris-

diction with the United States in and over the said tract of land, so far as that civil process in all cases, and such criminal process as may issue under the authority of the State of California, against any person or persons charged with crime committed within or without said tracts of land, may be executed therein in the same way and manner as if this jurisdiction had not been ceded, except so far as such process may affect any of the real or personal property of the United States within the said tract of land, and all the lands and tenements within the limits aforesaid shall be, and continue forever hereafter, exonerated and discharged from all taxes, assessments, and other charges which may be imposed by authority of this State.

SECTION 4. The relinquishment made, the jurisdiction ceded, and the exemption from taxation granted by this Act, shall continue so long as the premises herein specified shall remain in the occupancy of the above United States of America, for the purposes mentioned in the first section of this Act, and no longer.

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